15-7-46

RECORD, CASE No. 14,754.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~1280~~. ~~875~~ ~~560~~ 238

THE WISCONSIN CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM O. FORSYTHE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED JULY 20, 1891.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Wisconsin Central Railroad Company and William O. Forsythe, a manifest error hath happened, to the great damage of the said Wisconsin Central Railroad Company, as by its said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-fifth day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin.

S. U. PINNEY, *Attorney.*

2 [Endorsed:] Supreme Court of the United States. The Wisconsin Central Railroad Company, pl'ff in error, *vs.* William O. Forsythe, def't in error. Writ of error. S. U. Pinney, attorney.

The return to the within writ appears by the schedule hereto annexed.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART,
Clerk of the Circuit Court of the United States for the Western District of Wisconsin.

3 The return of the circuit court of the United States for the western district of Wisconsin.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Madison, this 30th day of June, A. D. 1891.

F. M. STEWART, *Clerk*.

Circuit Court of the United States of America for the Western District of Wisconsin.

UNITED STATES OF AMERICA, *Western District of Wisconsin*, } ss:

At a special term of the circuit court of the United States for the western district of Wisconsin begun and held, according to law, at the city of Madison, in said district, on the third Tuesday, being the sixteenth day, of June, A. D. 1891—present and presiding, the Hon. Romanzo Bunn, district judge—among other, the following proceedings were had, to wit:

THE WISCONSIN CENTRAL RAILROAD COMPANY, Plaintiff, *vs.* WILLIAM O. FORSYTHE, Defendant. } At Law.

Be it remembered that heretofore, to wit, on the fifth day of April, 1891, came the above-named plaintiff, by its attorneys, Messrs. Pinney & Sanborn, and filed its complaint in an action for the recovery of real estate against the above-named defendant as follows, to wit:

4 Circuit Court of the United States for the Western District of Wisconsin.

THE WISCONSIN CENTRAL RAILROAD COMPANY, Pl'ff, *against* WILLIAM O. FORSYTHE, Def't.

The complaint of the above-named plaintiff respectfully shows to the court—

That it is a corporation created and existing under and by virtue of the laws of the State of Wisconsin and a citizen of said State.

That it has an estate or interest in and to the southwest quarter of section eleven (11), town. forty-seven (47) north, of range four (4) west, in the county of Ashland and State of Wisconsin, to wit, that it is the owner thereof in fee simple, and that it is entitled to the possession of such premises; that its said title thereto is derived from and under and exists by virtue of a proper and rightful construction of a certain act of Congress, approved May 5, 1864, entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," and taken and construed in connection also with the act of Congress of June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State."

That the grant mentioned in section three of the act first above

mentioned was conferred upon this plaintiff by the legislature of the State of Wisconsin, and that said lands are within the ten-mile limits or granted limits of said grant along the line of railroad of said plaintiff, and that this plaintiff earned the same and became lawfully entitled thereto more than twelve years before the
5 commencement of this action by constructing and completing and putting in operation, as required by said acts of Congress, the twenty-mile section of said railroad opposite to the premises hereinbefore described, and that said premises are also within an alleged withdrawal of lands for indemnity purposes for the line of road now known as the Chicago, St. Paul, Minneapolis & Omaha Railway Company and within fifteen miles of said last-named line, under the said act of Congress of June 3, 1856, made previous to the passage of the act of May 5, 1864.

That said premises above described are of the value of six thousand dollars ($6,000).

And the said plaintiff further shows unto the court upon information and belief that the above-named defendant is now in possession of the said premises above described and unlawfully withholds the possession thereof from it, to its damage in the sum of five hundred dollars.

Wherefore the said plaintiff demands judgment for the recovery of the possession of said premises and damages as aforesaid for the unlawful withholding of the possession thereof and for such further or other relief as shall be just and equitable, together with the costs and disbursements of this action.

PINNEY & SANBORN,
Pff's Att'ys.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Howard Morris, being duly sworn, on oath says that he is the secretary of the corporation plaintiff in this action, namely, The Wisconsin Central Railroad Company, and makes this verification in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowl-
6 edge except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

HOWARD MORRIS.

Subscribed and sworn to before me this 4th day of April, 1890.
HUGH RYAN,
U. S. Commissioner, Eastern Dist. Wisconsin.

(Marked: Filed April 5, 1890. F. M. Stewart, clerk.)

Whereupon a summons issued as follows, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE WISCONSIN CENTRAL RAILROAD COMPANY, Pl'ff,
against
WILLIAM O. FORSYTHE, Def't.

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, a copy of which is herewith served upon you and which is filed in the office of the clerk of this court at Madison, Wisconsin.

And you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the
7 said western district of Wisconsin, this 5th day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

PINNEY & SANBORN,
Plaintiff's Attorneys.
F. M. STEWART, *Clerk.*

P. O. address, Madison, Wis.

Served on the within-named William O. Forsythe by showing him this summons and complaint and by delivering to him personally a copy thereof this 9th day of April, A. D. 1890.

D. C. FULTON, *Marshall,*
By JOHN BOLTON, *Deputy.*

Fees:	
Service	2 00
Copies	20
Travel	21 12
	$23 32

And afterwards, to wit, on the 2nd day of June, 1890, came the said defendant, by his attorneys, and filed his answer to said complaint as follows, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE WISCONSIN CENTRAL RAILROAD COMPANY, Plaintiff,
vs.
WILLIAM O. FORSYTHE, Defendant.

The above-named defendant, answering the complaint herein, by Weisbrod, Thompson & Harshaw and Geo. G. Greene, his attorneys, shows to this court:

For a first defence the defendant denies that the plaintiff has or ever had any estate or interest in or to the land described in said complaint or any part thereof, and denies that the plaintiff is or ever was the owner in fee simple or otherwise or entitled to the possession of said land or any part thereof. The defendant admits the incorporation and citizenship of the plaintiff, and that said land is within the ten miles place limits of the grant of section three of the act of Congress of May 5th, 1864, mentioned in the complaint, and also within a withdrawal of lands for indemnity purposes made previous to the passage of said act of 1854 under the act of June 3rd, 1856, mentioned in the complaint, for the line of road now known as the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and admits that said land is within 15 miles of said last-mentioned line of road. The defendant alleges that said withdrawal was duly made and remained in full force and effect at the time of the passage of the said act of 1864 and until long thereafter, and that by reason thereof all lands within said withdrawal were by the terms of said last-mentioned act expressly excepted from the grant of the third section thereof. The defendant admits that he is and at the commencement of this action was in possession of said premises, but denies that he unlawfully withholds or ever so withheld said premises or any part thereof from the plaintiff. The defendant admits that said premises are of the value of at least six thousand dollars. The defendant further alleges that the defendant is a citizen and resident of the State of Wisconsin.

And save as hereinbefore expressly admitted or denied the defendant denies each and every allegation in said complaint contained.

For a second defense the defendant alleges that the said plaintiff during the year 1888 instituted a proceeding in the General Land Office of the United States to obtain patents to the land described in the complaint under the grant of said section three in the said act of Congress of May 5, 1864; that prior to said last-mentioned proceeding the Secretary of the Interior, Hon. L. Q. C. Lamar, had, on Oct. 7, 1887, determined and adjudged, on the application of said Chicago, St. Paul, Minneapolis and Omaha Railway Company for the final adjustment of its said land grants under said acts of Congress of 1864 and of June 3, 1856, that the land described in the complaint and all lands within the limits of said indemnity withdrawal hereinbefore mentioned were by the said act of 1864 excepted from the grant of said section three thereof, and that the plaintiff had no title thereto or interest

therein; that in said proceeding instituted by the plaintiff as aforesaid it claimed that said former adjudication of Secretary Lamar was not binding on it, because it was not a party to and had not been heard in the proceeding in which such adjudication was made, and claimed that said lands within said withdrawal were not excluded from the grant of said section three of said act of 1864 because such withdrawal was not a reservation within the terms of the exception of section six of said act, and that if it was such a reservation it had been revoked and terminated by the repeal of the act of 1856 by that of 1864; that the questions thus presented were vigorously contested between the plaintiff and the United States on the hearing in said proceeding before the Commissioner of said Land Office, and after such contest the said Commissioner, on Oct. 15, 1888, determined and adjudged that the land described in the complaint and all lands within the limits of said indemnity withdrawal hereinbefore mentioned were by the said section six of the said act of 1864 excepted from the grant of said section three thereof, and that the plaintiff had no title thereto or interest therein; that the plaintiff, feeling itself aggrieved by said decision, appealed therefrom to the Secretary of the Interior, Hon.
10 John W. Noble, and on said appeal reiterated its said claim made before said Commissioner; that the questions thus presented were on said appeal again stoutly contested between the plaintiff and the United States on the hearing before said Secretary, and after said contest the said Secretary, on or about the 10th day of January, 1890, determined and adjusged that the land described in the complaint and all lands within the limits of said indemnity withdrawal hereinbefore mentioned were by said section six of said act of 1864 excepted from the grant of said section three thereof, and that the plaintiff had no title thereto or interest therein, and that all the title and interest therein remained in the United States.

And for a third defence the defendant alleges that from said final determination of Secretary Noble mentioned in the last preceding defence hereof, on or about the 10th day of January, 1890, until the commencement of this action, which was on the 9th day of April, 1890, the plaintiff acquiesced in said determination and took no step or proceeding at law or in equity to review, correct, contest, modify, or reverse the same or in any way relating to said land or said determination; that soon after said last-mentioned determination the land mentioned in the complaint was, on the ground of such determination, duly opened for sale and entry, and said withdrawal mentioned in the preceding defence hereof duly terminated; that thereafter and on or about the 12th day of January, 1890, the defendant, then being over twenty-one years of age and a citizen of the United States, relying on said determination, duly entered and was duly permitted by the United States to enter said land under and by virtue of the laws of the United States and took all of the steps and paid all of the charges and fees required by said
11 laws for such entry; that thereupon the defendant, still relying on said determination, went into possession of said land and built a residence and made other improvements thereon at an

expense to defendant of more than $200; that when defendant made said entry, went into possession, and built said residence and made said improvements, all of which was prior to the commencement of this action, he believed and had good reason to believe from said determination and plaintiff's said acquiescence therein that said land and every part thereof belonged to the United States and was subject to his said entry; that while defendant was in possession and building said residence and making said improvements as aforesaid the plaintiff well knew thereof and, knowing thereof, remained silent during all of the time that defendant was expending money in building said residence and making said improvements as aforesaid, without giving any notice or making any claim to defendant or of which he ever heard that it had or claimed any interest or title in or to said land or any part thereof.

Wherefore the defendant demands that this action be dismissed with costs.

WEISBROD, THOMPSON & HARSHAW &
GEO. G. GREENE, *Defendant's Attorneys.*

And afterwards and on the 19th day of June, A. D. 1890, at the June special term of said court, in the record of proceedings of said court in said cause, before the Hon. John M. Harlan, circuit justice, and Hon. Romanzo Bunn, district judge, *was* the following proceedings:

12 THE WISCONSIN CENTRAL RAILROAD COMPANY, Plaintiff, *vs.* WILLIAM O. FORSYTHE, Defendant. } At Law.

On this day came the respective parties, by their counsel, and this cause came on to be tried before the court and a jury duly impanneled, tried, and sworn, and, the court and jury having heard the evidence, the court thereupon directed a verdict for the plaintiff, subject to the opinion of the court thereon on a motion for judgment or for new trial, and such verdict is thereupon rendered as follows: "We, the jury impanneled and sworn to try this cause, find for the plaintiff that it has an estate and interest in and to the southwest quarter of section eleven (11), town. forty-seven (47) north, of range four (4) west, in the county of Ashland and State of Wisconsin, in fee simple, and that it has established such estate in and to said premises, and that the value thereof exceeds five thousand dollars, and that it is entitled to the possession of said premises from the said defendant, and we assess the plaintiff's damage by reason thereof at the sum of six cents;" and thereupon the said plaintiff moved the court for judgment thereon in its favor and against the defendant, and the said defendant moved the court to set aside the verdict and for a new trial, and argument of said motion commenced June 21, 1890. This day the argument of said motion on the verdict made by the plaintiff and the motion by the defendant to set aside the verdict for a new trial, is concluded, and the court, not being sufficient- advised of and concerning its opinion

thereon, takes time to consider the same. September 15, A. D. 1890, ordered that the verdict heretofore returned by the
13 jury in this cause be set aside and a new trial awarded.

And afterwards and at the June special term of said court A. D. 1891, to wit, on the 16th day of June, 1891, the same being the first day of said term, in the record of the proceedings of said court in said entitled cause, before the Hon. Romanzo Bunn, district judge, was the following entry made: This day came the respective parties, by their counsel, and this cause came on to be again tried before the court and jury duly impaneled, tried, and sworn, and, the court and jury having heard the evidence, the court thereupon directed a verdict for the defendant, and such verdict is thereupon rendered and returned as follows: We, the jury, do find for the defendant and find the value of the land described in the complaint to be eight thousand dollars. Whereupon it is considered and adjudged by the court now here that the said plaintiff take nothing by this action, that the defendant go thereof without day, and that the defendant, William O. Forsythe, do have and recover of the said plaintiff, The Wisconsin Central Railroad Company, the sum of thirty-five dollars and seventy-five cents ($35.75), his costs and disbursements in this action duly taxed and allowed, and that he have execution therefor. Judgment-roll signed June 18, A. D. 1891.

F. M. STEWART, *Clerk*.

That afterwards, on the said sixteenth day of June, A. D. 1891, the following bill of exceptions was duly allowed and filed in said cause—that is to say:

14 Circuit Court of the United States for the Western District of Wisconsin, Special June Term, at Madison, in said District, Begun and Held on the 16th Day of June, A. D. 1891.

THE WISCONSIN CENTRAL RAILROAD COMPANY
vs.
WILLIAM O. FORSYTHE.

Be it remembered that heretofore, to wit, at the term of said court aforesaid and on the first day of said term, namely, the 16th day of June, A. D. 1891, the issues so joined as aforesaid in this action came on to be tried before said court and a jury duly impaneled and sworn for that purpose, the Hon. Romanzo Bunn, district judge, presiding in said court.

And thereupon the plaintiff, to maintain and prove said issues on its part, called the attention of the court to the grants mentioned in the acts of Congress specified in the complaint in this action, namely, the act of Congress of June 3, 1856, and the act of Congress of May 5, 1864, granting lands to the State of Wisconsin for certain railroad purposes therein specified, and also to an act of Congress of April 9, 1874 (18 U. S. Stat., 28), by which the time specified in the ninth section of said act of Congress of May 5, 1864, for the completion of the road mentioned in the third section of said act and for the

reversion to the United States of the lands granted by said act to aid in the construction of said road was extended until the 31st day of December, 1876.

15 The plaintiff, to maintain its case, gave in evidence—

First. Chapter 118 of the Laws of Wisconsin, 1856, approved October 8, 1856 (Land Grant Case, 996):

"SEC. 1. That the lands, rights, powers and privileges, granted to and conferred upon the State of Wisconsin by the act of Congress, entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3, 1856, be and the same are hereby accepted upon the terms, conditions and restrictions contained in said act of Congress, and the said State of Wisconsin hereby assumes and undertakes the trust created by the said act of Congress.

"SEC. 2. This act shall be in force so soon as the same is published."

Second. An act of the legislature of Wisconsin, chapter 122 of the Laws of 1856 (Land Grant Case, 996–1005). This is a public act. Sections 1, 2, 4, 5, 9, and 11 are as follows:

"SECTION 1. The La Crosse & Milwaukee Railroad Company is hereby authorized and empowered to survey, locate, construct, complete and perpetually to have, use, maintain and operate railroads with one or more tracks or lines, from the city of Madison, in the county of Dane, and from the village of Columbus, in the county of Columbus, on the most direct and feasible route, by the way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield, and shall have, possess, exercise and enjoy the same rights, privileges, functions, franchises, authority and immunities with reference to the said routes, or any railroad to be built thereof, as it now possesses or enjoys, with reference to any route it is now authorized to occupy, or any railroad built or to be built thereof; and there is hereby conferred upon the La Crosse &

16 Milwaukee Railroad Company all the power and authority contained in the charter of said company, and the acts amendatory thereof, for the purpose of carrying out the object of this act and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built."

"SEC. 2. The said roads shall be constructed on the most direct and feasible routes from Madison to Portage City, and from Columbus to Portage City, and simultaneously as nearly as practicable, and both of them shall be completed by the last day of December, A. D. 1858, and for the purpose of estimating and selecting the lands granted by Congress the city of Madison is hereby designated as the point of commencement of said road, and the whole of the railroad hereby authorized to be constructed shall be constructed by said La Crosse & Milwaukee Railroad Company within ten years from the third day of June, A. D. 1856."

"SEC. 4. For the purpose of aiding in the construction of the said roads, which by this act the said La Crosse & Milwaukee Railroad

Company is authorized to construct, all the interest and estate, present and prospective, of this State, in or to any and all the lands granted by the Government of the United States to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, by virtue of an act of Congress entitled, 'An act granting a portion of the public lands to the State of Wisconsin to aid in the construction of railroads,' approved June 3, 1856, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress, are hereby granted to the said La Crosse & Milwaukee Railroad Company: Provided, that the said land shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other work whatever; and provided further, that the title to said lands shall vest in the said La Crosse & Milwaukee Railroad Company, in the manner following: that is to say, whenever twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the governor of this
State shall certify to the Secretary of the Interior the fact that
17 such twenty continuous miles of such roads are completed as aforesaid, then the title *of* two hundred and forty sections of said land shall vest in the said La Crosse & Milwaukee Railroad Company; and whenever a second twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the governor shall certify as above, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company, and so from time to time until said roads are completed. And it shall be the duty of the governor so to certify to the Secretary of the Interior whenever any such twenty miles are completed so as to admit of running of regular trains of cars over the same. And the governor of the State shall in his official capacity, and in behalf of the State, and under the great seal thereof, execute and deliver to the La Crosse & Milwaukee Railroad Company, whenever it shall, by virtue of the provisions of this chapter, be entitled to any of said lands, a deed in fee simple of any and all the lands to which said company shall be entitled: Provided, that said company shall not sell any of said lands until twenty miles of said road shall be completed, so as to admit of running regular trains over the same, and so on from time to time, so that the sales of land by said company shall never exceed six sections of land for every mile of said road so completed."

"SEC. 5. The location and designation of the route and line of the said roads shall be made by the said La Crosse & Milwaukee Railroad Company, and the same shall from time to time, and as fast as practicable, be reported to the governor of this State. The selection of lands provided for in the act of Congress herein mentioned shall be made by such agents as may be appointed by the governor of this State. Said selection, as well as the survey, location

and completion of said roads, and the compensation of such agents, shall be at the cost and charge of said company, without charge of any kind upon the treasury of the State of Wisconsin. Said railroads which shall be constructed by the application of funds derived from the lands herein granted shall be and remain public highways for the use of the Government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States; and the United States mail shall be transported over said roads under the direction of the Post Office Department, as provided in said act of Congress."

18 "SEC. 9. The said La Crosse & Milwaukee Railroad Company shall be capable in law of taking and holding any lands granted by the Government of the United States, or of this State, to aid in the construction of railroads, which shall be conveyed to said company by this act, or by deed, or by operation of law, and may also mortgage or pledge, or otherwise dispose of, all their right, title and interest, claims or demands of, in or to any lands, or interest in lands, granted to said company by this act, and in any other estate, real, personal or mixed, of which they may be seized at time of execution of such mortgage, or which they may acquire subsequent thereto, in such manner and on such terms as the directors may think proper."

"SEC. 11. This act and all grants herein contained shall cease and be void unless the said La Crosse & Milwaukee Railroad Company shall accept of the same within five days after the passage of this act; and such acceptance shall be by a resolution adopted by the directors of said company, a copy of which, duly certified by the secretary of said company, under its corporate seal, within said period of five days from the passage of this act, shall be deposited in the office of the secretary of state; and in case the said La Crosse & Milwaukee Railroad Company shall violate the provisions of this act, the legislature may repeal this act, and may revoke all and singular the rights and franchises herein conferred, so far as the same has not been performed and fulfilled, and so far as the rights and privileges hereby granted have not become complete and absolute."

Third. Chapter 230 of the Laws of Wisconsin, 1857, approved March 5th (Land Grant Case, 1077, 1078). Sections 1 and 2 are as follows:

"SECTION 1. The Saint Croix & Lake Superior Railroad Company is hereby authorized and empowered to survey, locate, construct, complete and perpetually to have, maintain and operate a railroad with one or more tracks or lines, from any point or place on the Saint Croix lake or river, or on the Mississippi river, southerly of township number twenty-seven, and northerly of township number twenty-five, which may be determined upon by its board of directors, to the west end of Lake Superior and to Bayfield, and for such purpose shall possess all the rights, powers and privileges conferred by its charter in relation to the road therein authorized to be constructed."

19 "SEC. 2. It shall be lawful for the said company to receive, and for the La Crosse & Milwaukee Railroad Company to grant and convey to the said Saint Croix & Lake Superior Railroad Company, all the right, title and interest of the said La Crosse & Milwaukee Railroad Company in and to that portion of the lands, or any part thereof, heretofore granted to the said La Crosse & Milwaukee Railroad Company, which lie north of the point or place where the road of the said last-mentioned company shall intersect the St. Croix lake or river, or other point which may be determined upon by the said last-named company, or such portion of said lands as said companies may agree; and whenever such conveyance shall be made, the said Saint Croix & Lake Superior Railroad Company shall possess all the rights, powers and privileges in regard to the construction of said road, from the point so determined on to the west end of Lake Superior and to Bayfield, and in regard to the application and disposal of said land, or any portion thereof, and in regard to the running of said portion of said road, and shall be subject to the same liabilities, duties, conditions and regulations, and the payment of the same amount of percentage upon the gross earnings of said road, which are conferred or imposed upon, or required of, the said La Crosse & Milwaukee Railroad Company, or to which said last-named company was subjected by an act approved October 11, 1856, entitled 'An act to grant certain lands to the La Crosse & Milwaukee Railroad Company, and to execute the trust created by an act of Congress entitled "An act granting certain lands to the State of Wisconsin, to aid in the construction of railroads in said State," approved June 3, 1856;' and so far as such portion of said railroad is concerned, the said La Crosse & Milwaukee Railroad Company shall be, from the date of such conveyance, exonerated and released from such liabilities and duties."

Fourth. Deed of division pursuant to the said last-named act (Land Grant Case, 1232–1238), dated March 10, 1857, between the La Crosse & Milwaukee Railroad Company, party of the first part, and St. Croix & Lake Superior Railroad Company, of the second part, whereby "the party of the first part bargained, sold, released, conveyed, assigned, set over, and forever quitclaimed to the said party

20 of the second part all the estate, real, personal and mixed, embraced and described in a certain indenture made and executed in duplicate on the nineteenth day of February, one thousand eight hundred and fifty-seven, between the said parties; * * * and also all that portion and route of a certain railroad authorized by the aforesaid act of the legislature, approved October 11, 1856, to be built by the said party of the first part, lying and between such points on the St. Croix river or lake between townships twenty-five and thirty-one as shall be designated by the said party of the first part, and the west end of Lake Superior, and from any point on the said last aforesaid route to Bayfield, together with all the power to survey, locate, and construct, complete, perpetually to have, use, maintain, and operate railroads, with one or more tracks or lines thereon," etc., etc. "And the said party of the first part, for the consideration aforesaid, does hereby sell and convey to the said

party of the second part all the interest of the said party of the first part in and to every alternate section of land, designated by odd numbers, for six sections in width on each side of said road from the point aforesaid on the St. Croix river or lake to the west end of Lake Superior, and from any point on said last aforesaid route to Bayfield, together with such lands within fifteen miles of the line or route of said road or roads as shall be selected in pursuance of said act of Congress in lieu of any sections or parts of sections which shall have been sold by the United States or to which the right of pre-emption has attached; but it is hereby expressly understood between the parties hereto that the said La Crosse & Milwaukee Railroad Company possesses, and does not surrender or release, the right of selecting any lands within fifteen miles of and more than six miles from the route of the said road or roads between the St. Croix river or lake and the west end of Lake Superior, and also between the said route and Bayfield, for the purpose of making up any deficiency which does or may exist in the quantity
21 of lands to which the said La Crosse & Milwaukee Railroad Company is or may be entitled upon that point of its line extending from Madison to the St. Croix river or lake." Recorded in the office of secretary of state November 19, 1857.

Fifth. Chapter 233, Laws of Wisconsin, 1861, approved April 12, 1861, to amend chapter 299 of the Private and Local Laws of 1855, entitled "An act to incorporate the Sugar River Valley Railroad Company," and the acts amendatory thereto, and to repeal and annul a portion of a grant of land heretofore made to the La Crosse & Milwaukee Railroad Company. (Land Grant Case, 1081–1085.)

Sections 1, 2, 3, 7, 8, and 9 are as follows:

"SECTION 1. The Sugar River Valley Railroad Company is hereby authorized and empowered to survey, locate, contract, complete and operate a railroad from the city of Madison, in the county of Dane, and the village of Columbus, in the county of Columbia, on the most direct and feasible routes, to the city of Portage, in the county of Columbia; and shall have, exercise and enjoy the same rights, privileges, franchises and authority with reference to said routes, or any railroads to be built thereon, as it now possesses with reference to any part it is now authorized to occupy, or any railroad built or to be built thereon; and there is hereby conferred upon the Sugar River Valley Railroad Company all the powers and authority contained in the charter of said company and the acts amendatory thereof, for the purpose of carrying out the objects of this act and of appropriating and applying the lands hereinafter granted or their proceeds, to aid in the construction of railroads by this act authorized to be built."

"SEC. 2. The said railroad shall be constructed on the most direct and feasible routes from Madison and Columbus, respectively, to the city of Portage, and simultaneously as near as practicable, and both of them shall be completed on the 31st day of December, 1863; and for the purpose of estimating and selecting the lands granted by Congress, the city of Madison is hereby designated as the point of commencement of the said railroad."

"SEC. 3. For the purpose of aiding in the construction of said
22 railroad from the city of Madison, in the county of Dane, and from the village of Columbus, in the county of Columbia, to the city of Portage, in the county of Columbia, there is hereby granted to the Sugar River Valley Railroad Company all the interest and estate, present and prospective, of this State in and to so much of the lands granted by the Government of the United States to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of the city of Portage, to the St. Croix river or lake, and from thence to Lake Superior and to Bayfield, by virtue of an act of Congress entitled 'An act granting a portion of the public lands to the State of Wisconsin to aid in the construction of railroads,' approved June 3, 1856, as is or can be made applicable to the construction of that part of said railroad lying between the city of Madison and the city of Portage, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress to so much of said grant of land, and the same are hereby granted to the said Sugar River Valley Railroad Company, except as hereinafter provided. The title of said lands shall vest in the said Sugar River Valley Railroad Company in manner following, that is to say: Whenever twenty continuous miles of the said railroad between the city of Madison and the city of Portage shall have been completed so as to admit of running regular trains on the same, the governor of this State shall certify to the Secretary of the Interior the fact that such twenty continuous miles of such road are completed as aforesaid, then the title to one hundred and twenty sections of said land shall vest in the said Sugar River Valley Railroad Company; and when all of the railroad from the village of Columbus to the city of Portage, and a second twenty continuous miles of the railroad from the city of Madison to the city of Portage, shall have been completed, so as to admit of the running of regular trains on the same, then the governor shall certify as above, and thereupon the title to a further quantity of one hundred and twenty sections of said lands shall vest in said company: Provided, the said Sugar River Valley Railroad Company shall not, for the purpose of aiding in the construction of said road from Madison to Portage City, incumber any of the lands to which said company is to be entitled on the completion of said first twenty miles of said railroad."

"SEC. 7. This act and the grant herein contained shall cease
23 and be void unless the said Sugar River Valley Railroad Company shall accept the same within twenty days after the taking effect of this act. Such acceptance shall be by resolution adopted by the directors of said company, a copy of which, duly certified by the secretary of said company, within the said period of twenty days, shall be deposited in the office of the secretary of state; and in case the said company shall fail to expend at least fifty thousand dollars in the construction of said road within one year, or shall fail to complete the road from Madison to Portage City so as to admit of the running of regular trains upon the same by the 31st of December, 1863, or shall otherwise violate the provisions of this act, the legislature may repeal

the same and may revoke and annul all and singular the rights and franchises herein conferred upon said company, so far as the same have not been performed and fulfilled, and so far as the rights and privileges granted have not become complete and absolute or vested."

"SEC. 8. So much of an act entitled 'An act to grant certain lands to the La Crosse & Milwaukee Railroad Company, and to execute the trust created by an act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved October 11, 1856, and so much of the grant of lands as by said act was made to the La Crosse & Milwaukee Railroad Company, as is or can be made applicable to the construction of a railroad from the city of Madison to Portage City, and from the village of Columbus to Portage City, and all and singular the rights, privileges and franchises thereby conferred, granted and conveyed to the said La Crosse & Milwaukee Railroad Company, so far as the roads from Madison to Portage City, and from Columbus to Portage City, and the lands granted to aid in the construction of the same, are concerned, are hereby repealed, revoked, annulled and declared void.

"SEC. 9. This act is hereby declared a public act, and shall take effect and be in force from and after its passage and publication.

"Approved April 12, 1861."

Sixth. Chapter 243, Laws of Wisconsin, 1863, An act to incorporate the Tomah & Lake St. Croix Railroad Company and to repeal and annul a portion of a grant of land heretofore made to the La Crosse & Milwaukee Railroad Company. (Land Grant Case, 1085–1101.)

24 Section 5 gives the company power "to survey, locate, construct, complete, alter, change the location of, reconstruct, maintain, and operate a railroad, with one or more tracks or lines, on such route and with such alignment and graduation as said company shall think proper, from such point as the directors shall determine, in the town of Tomah, in the county of Monroe, or on the track of the Milwaukee & La Crosse railroad, or of any other railroad running out of Tomah, by way of Black River Falls, thence by the most feasible route to such point on Lake St. Croix, between townships twenty-five and thirty-one, as the directors shall determine."

Sections 14, 15, 16, 17, 18, and 19 are as follows:

"SEC. 14. For the purpose of aiding in the construction of said railroad, there is hereby granted to the Tomah & Lake St. Croix Railroad Company, herein created, all the interest and estate, present and prospective, of this State in and to so much of the lands granted by the Government of the United States to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Madison to Columbus, by way of the city of Portage, to the St. Croix river or lake, and from thence to Lake Superior and to Bayfield, by virtue of an act of Congress entitled 'An act granting a portion of the public lands to the State of Wisconsin to aid in the

construction of railroads,' approved June 3, 1856, as is or can be made applicable to the construction of that part of said railroad lying between the village of Tomah, in the county of Monroe, and Lake St. Croix, (in) this State, together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress, to so much of said grant of land; and the same are hereby granted to the said Tomah & Lake St. Croix Railroad Company, except as hereinafter provided. The title of said lands shall vest in said Tomah & Lake St. Croix Railroad Company, in manner following, that is to say: Whenever twenty continuous miles of said railroad between Tomah and Lake St. Croix shall have been completed, so as to admit of running regular trains on the same, the governor of this State shall certify to the Secretary of the Interior the fact that twenty continuous
25 miles of such road are completed as aforesaid, then the title to one hundred and twenty sections of said land shall vest in the said Tomah & Lake St. Croix Railroad Company; and when a second twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the governor shall certify as above, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company; and so, from time to time, until said road shall have been entirely completed: Provided the Tomah & Lake St. Croix Railroad Company shall not, for the purpose of aiding in the construction of the said railroad from Tomah to Lake St. Croix, incumber any of the lands to which said company is to be entitled on the completion of the road as herein provided; and provided further, that the said railroad shall be completed on or before the third day of June, 1866."

"SEC. 15. The governor of this State, in his official capacity, and in behalf of the State and under the great seal thereof, shall execute and deliver to the Tomah & Lake St. Croix Railroad Company, or their legal representatives or their assignees, whenever, by virtue of the provisions of this act, said county shall be entitled to any of said lands, a deed in fee simple of any and all of the lands to which the said company may be entitled."

"SEC. 16. If it shall appear upon the location of said road that any of the lands granted by the act of Congress aforesaid, applicable to the construction of said road, have been sold or disposed of by the United States, the governor, upon application of said company, shall appoint such agent or agents as may be necessary to select and locate other lands in lieu thereof, as provided in the act of Congress aforesaid; and such selections shall be made at the expense of said railroad company, and no part of said expense shall be paid out of the State treasury. Such railroad shall be and remain a public highway for the use of the Government of the United States, free from tolls and other charges upon the transportation of property or troops of the United States, and the United States mail shall be transported over said road, under the direction of the Post Office Department, as provided in said act of Congress."

"SEC. 17. This act and the grant herein contained shall cease

and be void unless the said Tomah & Lake St. Croix Railroad Company shall accept the same within six months after the taking effect of this act. Such acceptance shall be by resolution, adopted
26 by the directors of said company, a copy of which, duly certified by the secretary of said company, within the said period of six months, shall be deposited in the office of the secretary of state."

"SEC. 18. So much of an act entitled 'An act to grant certain lands to the La Crosse & Milwaukee Railroad Company, and to execute the trust created by an act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved October 11, 1856, and so much of the grant of lands as by said act were (was) made to the La Crosse & Milwaukee Railroad Company, as is or can be made applicable to the construction of a railroad from Tomah, in the county of Monroe, to Lake St. Croix, in this State, and all and singular the rights, privileges and franchises thereby conferred, granted and conveyed to the said La Crosse & Milwaukee Railroad Company, so far as the road from Tomah to Lake St. Croix, and the lands herein granted to aid in the construction of the same, are concerned, are hereby repealed, revoked and annulled, and declared void.

"SEC. 19. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage and publication.

"Approved April 1, 1863."

At this stage in the history of State legislation the act of Congress of May 5, 1864, was passed.

Seventh. Joint resolution number 8 of the legislature of Wisconsin of March 20, 1865, as follows (Land Grant Case, 1015):

"Resolved by the senate, the assembly concurring, That the lands granted to the State of Wisconsin for the purpose of aiding in the construction of certain railroads within this State, by virtue of an act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864, be and the same are hereby accepted by the State of Wisconsin, subject, however, to all the conditions of said act of Congress. And the State of Wisconsin hereby consents to execute the said trust by the aforesaid act of Congress, pursuant in all things to the terms, limitations and conditions of said act.

"Resolved, That the secretary of state be and he is hereby
27 authorized and required to transmit a certified copy of this resolution to the Secretary of the Interior of the United States.

"Approved March 20, 1865."

Eighth. Chapter 126, Laws of Wisconsin, 1874, of which sections 1 and 8 are as follows (Land Grant Case, 1041, 1044):

"SECTION 1. There is hereby granted to the North Wisconsin Railroad Company all the right, title and interest which the State of Wisconsin now has or may hereafter acquire in and to the lands granted to said State by acts of Congress approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the St.

Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and Bayfield, except those herein granted to the Chicago & Northern Pacific Air Line Railway Company, this grant being for the purpose of enabling the said North Wisconsin Railway Company to complete the said line heretofore partially constructed by them from the St. Croix river or lake aforesaid, to Bayfield, the said grant being, however, upon the express condition that the said company shall immediately proceed with the construction of said road from the St. Croix river or lake to Bayfield, and shall construct so much thereof the first year as shall, with that already constructed, make forty miles, and not less than twenty miles each year thereafter, until the entire road is completed."

"SEC. 8. There is hereby granted to the Chicago & Northern Pacific Air Line Railway Company all the right, title and interest which the State of Wisconsin now has or may hereafter acquire in or to that portion of the lands granted to said State by said two acts of Congress, as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also
28 construct and put in operation the railway of said company from Genoa northerly at the rate of twenty miles per year."

The Chicago, St. Paul, Minneapolis & Omaha Company, it appears from other proof, by consolidation became the successor in interest of the North Wisconsin Railway Company in and to said grants.

Ninth. The plaintiff offered in evidence certain notices of withdrawal of lands from sale or entry as follows:

"A.

"GENERAL LAND OFFICE, *May* 29, 1856.

"Reg'r and receiver, La Crosse, Wisconsin:

"You will suspend from sale and location all the lands in your district until further orders.

"Acknowledge the receipt of this despatch by telegraph and mail.

"THOS. A. HENDRICKS,
"*Commissioner.*"

Copy of same and same date sent to offices at Hudson, Mineral Point, Menasha, Stevens' Point, and Superior, Wis.

"B.

"GENERAL LAND OFFICE, *June* 12, 1856.

"Reg's and rec'v'r, Mineral Point, Wisconsin.

"GENTLEMEN: By my telegraphic despatch of the 29th ult. you were requested to suspend from sale or location until further orders all the lands in your districts. The object of this withdrawal was to protect the lands from sale granted to the State for railroad purposes by a bill which has passed both houses of Congress, which having been approved by the President on the 3d instant and thus become a law, I have to request that you will continue the reservation until otherwise directed.

"The governor has this day been advised and requested to furnish in advance sketch maps of the route of the roads, with a view to releasing as many of the lands as can be safely returned without interfering with the public limits of selection, and also of the maps of actual final locations, on the receipt of which latter a further reduction may be made.

"Acknowledge the receipt of these instructions by mail, giving the date of their reception at your office.

"I am, very respectfully, your ob't serv't,

"THOS. A. HENDRICKS,

"*Commissioner.*"

The above was also sent to the offices above named.

29 October 26, 1856, the Commissioner of the General Land Office issued an order addressed to the registers and receivers at Superior City, Hudson, and Eau Claire respectively, in the State of Wisconsin, in which he instructed them as follows:

"Upon the filing in your office of duly certified map of the line of route as definitely fixed of any of the roads referred to in the act entitled An act granting public lands to the State of Wisconsin to aid in the construction of railroads in such State, approved June 3, 1856, you will, without waiting for further instructions from this office, cease to permit locations by entries or pre-emption or for any purpose whatever of the land within fifteen miles of said route."

It was also shown that the map of definite location of that part of the main line of road from Madison by way of Portage City to the St. Croix river or lake was filed by the La Crosse & Milwaukee Company September 7, 1857. The map of definite location of the main line north from St. Croix river or lake to the west end of Lake Superior was filed by the St. Croix & Lake Superior Company March 2, 1858, and the map of definite location of the Bayfield branch was filed by the same company July 17, 1858. These several maps of location were filed, under the provisions of the act of June 3, 1856, in the Department of the Interior.

It also appeared that only sixty-one miles of the said roads had been constructed prior to the passage of the act of May 5, 1864, namely, from Portage to Tomah, and were constructed by the La Crosse & Milwaukee Company in the spring of 1858.

Tenth. The map of the said locations and map of the locations made under the act May 5, 1864, with the place and indemnity limits delineated thereon, from the Commissioner of the General Land Office, were offered in evidence.

30 Also the following order to the several local land offices was put in evidence.

After the location of the Bayfield branch the Commissioner made the following order:

GENERAL LAND OFFICE, *March* 1, 1859.

Register and receiver at land office, Hudson, Wisconsin.

GENTLEMEN: For your information in the matter I herewith enclose a diagram of the district of lands subject to sale at your office upon which has been designated the line of route and the lines of the six and fifteen mile limits of the St. Croix and Lake Superior and the Bayfield line of railroads, to aid in the construction of which a grant of lands was made to the State of Wisconsin by the act of June 3, 1856.

As all the vacant tracts in the odd-numbered sections outside the six and within the fifteen mile limits of the roads have been selected by the agent of the State in lieu of the lands sold and pre-empted in the alternate sections granted by the above-mentioned act, such tracts you will, of course, continue to reserve, as heretofore, from sale or location for any purpose whatever.

THOMAS A. HENDRICKS,
Commissioner.

31 Said maps are each marked for identification "Wisconsin Central Railroad Company *vs.* William O. Forsythe, June 16, 1891, Romanzo Bunn, district judge," and will be produced as a part of the record at the hearing.

Eleventh. Plaintiff also gave in evidence the following order, addressed to the registers and receivers of the several places before named, dated February 5, 1866:

32 "Register and receiver, La Crosse, Wisconsin.

"GENTLEMEN: By the 2d section of the act approved May 5, 1864, a grant of land is made to the State of Wisconsin 'for the purpose of aiding in the construction of a railroad from the town of Tomah, * * * in said State, to the St. Croix river or lake' of every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road.

"It also provides that for indemnity for lands disposed of or to which the right of pre-emption or homestead has attached the State shall have the right to select an equal amount of lands from the odd sections within twenty miles on each side of the road.

"By the 4th section of said act the even sections on each side of said road are not to be sold at less than double the minimum price when sold, nor are they to be subject to private entry until they shall have first been offered at the increased price.

"I enclose a diagram showing the 10 and 20 mile limits of the

road in your district, and you will make in pencil the limits on the plats in your office and withhold the odd sections within both limits from sale and location, pre-emption settlement, or homestead entry. The even sections within the 10-mile limits will only be subject to settlement and entry under the pre-emption and homestead laws at $2.50 per acre.

"You will acknowledge the date of the receipt of this order.

"Very respectfully, your obedient servant,

"J. M. EDMUNDS,

"*Commissioner.*"

Twelfth. Also another like order, dated February 28, 1866, in relation to the road provided for in the first section of the act approved May 5, 1864.

Thirteenth. Testimony of General Simeon Mills and Major M. A. Fulton.

33 SIMEON MILLS testified:

I reside in the city of Madison, Wisconsin; have resided there fifty-two or fifty-three years. I remember a corporation known as the Sugar Valley Railroad Company. At one time I was one of its directors. I have some indistinct recollection of the effort this company made to build a road from Madison to Portage City and obtain a land grant; this was a good many years ago. I think I was connected with it from the early part of 1862 for some time over a year. I do not recollect how long; perhaps two years. I think there was a provision in the land grant that required them to expend $50,000.00 within a certain year and to complete the road by 1863. It did not to my knowledge ever complete any road at all. I have not any distinct recollection now whether it expended $50,000 during the year mentioned. I made a deposition in the land-grant case, in which I stated the amount expended, but I do not remember what it was.

Q. You said the greater portion of it was in Columbia county, but some in Dane. "The Sugar Valley Railroad Company may have spent in the neighborhood of $25,000; along there." I call your attention to this to refresh your memory; also "I understand the lack of confidence and money prohibited the resuming of the work." What do you remember about those facts?

A. I remember that statement was made under oath some ten or twelve years ago. I have no distinct recollection about it now.

Q. Did you then remember it so as to know it was true?

A. I did; yes, sir; I read it over this morning, and I know it was true, although I have no distinct recollection from the

34 fact itself. There was no road completed from Madison to Portage or from Madison to Tomah before May 5, 1864. There was a road from Madison to Chicago, I think, that had been completed here earlier than that time. It was the Madison and Beloit railway.

Maj. M. A. FULTON testified:

I live at Hudson, St. Croix county, Wisconsin; have lived there thirty-six years. There was no part of the land-grant road built or constructed beyond Hudson up towards Lake Superior prior to May 5, 1864, or northwest of Tomah, and no part of the branch to Bayfield. The main line was constructed through to Lake St. Croix in the spring of 1871, and they commenced building up towards New Richmond, on the Northern division, I cannot tell exactly, but a little later—quite a number of years later. That construction of the road from Tomah to Lake St. Croix was by way of Black River Falls, through Jackson county, under the act of 1864, and did not come around by La Crosse; it was on the new line or Baldwin line, as it was called.

Fourteenth. The plaintiff gave in evidence a resolution of the St Croix & Lake Superior Railroad Company of April 22, 1865, passed by its executive committee, as follows:

"Resolved, That the St. Croix & Lake Superior Railroad Company accept the grant of lands made by Congress to the State of Wisconsin to aid in the construction of a railroad from the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior and to Bayfield by an act of Congress approved May 5, 1864, and the act of the legislature of Wisconsin conferring the same on the St. Croix & Lake Superior Railroad Company by an act approved March 20, 1865.

"Resolved, That the line as now located by maps on file in the Land Office at Washington be the line adopted for the selection of lands conferred on this company by grant."

35 Fifteenth. Also chapter 175 of the Laws of Wisconsin for 1865 (Land Grant Case 1013), of which section 1 is as follows:

"SECTION 1. There is hereby granted and conferred to and upon the St. Croix & Lake Superior Railroad Company all the lands, rights, privileges and immunities granted and conferred to the State of Wisconsin, in granting lands for the purpose of aiding the construction of a railroad, and the extension of the time for the completion of the same, from the St. Croix river or lake between townships twenty-five and thirty-one, to the west end of Lake Superior and to Bayfield, as is conferred and granted to the State of Wisconsin by the act of Congress approved May 5, 1864; and also all the lands, rights and privileges heretofore granted and conferred by this State to and upon said company, to aid in building said railroad, as above described, which were embraced in the act of Congress granting lands to the State of Wisconsin, approved June 3, 1856, is hereby confirmed. And the point of intersection of the said Bayfield branch shall be and remain the same as is now fixed by the survey and maps now on file in the Land Office at Washington; provided, that said grant is made subject to all the conditions and restrictions as are imposed upon the State by the said acts of Congress, respectively."

Sixteenth. Also chapter 232, Laws of Wisconsin, 1865 (Land Grant Case 1014, 1015), as follows:

"SECTION 1. That there be and is hereby granted to and upon the Tomah & Lake St. Croix Railroad Company all and singular the rights, privileges and interest granted and conferred and bestowed to and upon the State of Wisconsin, by an act of Congress approved May 5, 1864, and any and all the lands in said act of Congress mentioned, granted and conferred to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from the town of Tomah, in the county of Monroe, in said State, to the St. Croix river or lake, between townships twenty-five and thirty-one, and also all the lands, rights and privileges heretofore granted by this State to and upon said company, to aid in building said railroad, as above described, which were embraced in the act of Congress granting lands to the State of Wisconsin, approved June 3, 1856, is hereby confirmed, and hereby conferring, granting unto said railroad com-
36 pany every right and privilege as to the extension of time for building said railroad which is given to said State by said act of Congress, and all and singular every other provision of said act of Congress relative to said lands, in both of said grants herein referred to; provided, said grant is subject to the same conditions and restrictions which are imposed on said State by said acts of Congress, respectively.

"SEC. 2. And be it further enacted, that all other lands which said railroad company may so acquire under the said act of Congress, approved May 5, 1864, shall only be subject to the same mode, extent and rules of taxation as heretofore provided for the laws of this State, by an act approved April 2, 1864, as to lands which it might acquire under the said act of Congress, entitled 'An act granting a portion of the public lands to the State of Wisconsin, to aid in the construction of railroads,' approved June 3, 1856.

"SEC. 3. All previous laws of this State contravening or militating against this act are hereby repealed.

"SEC. 4. This act shall take effect and be in force from and after its passage and publication.

"Approved March 29, 1865."

Also chapter 90 of the Laws of Wisconsin for 1869, repealing said chapter 175 of the General Laws of 1865, pertaining to the St. Croix and Lake Superior Railroad Company, approved March 5, 1869, and published March 8, 1869, and also a certain other act repealing said chapter 175, viz., chapter 89 of the Laws of 1872, approved March 22, 1872; and also chapters 120, 121, 137, and 138 of the Laws of Wisconsin for 1872, each approved March 25, 1872, repealing chapter 51 of the Private and Local Laws of 1869, chapters 500 and 510 of the Private and Local Laws of 1870, and section 19 of chapter 407 of the Private and Local Laws of 1869.

Seventeenth. Also chapter 314 of the Laws of Wisconsin, 1866 (Land Grant Case, 1104–1129), the first section of which creates "The Winnebago & Superior Railroad Company," a body corporate and politic, etc., with the usual powers.

The second section authorized it to survey, locate, construct, complete, etc., a railroad, with one or more tracks or lines, from Doty's island on the most direct and feasible route to Bayfield,

thence to Superior, on Lake Superior, by way of Waupaca, in the county of Waupaca, and Stevens' Point, in the county of Portage, and an extension of said road from Doty's island to the city of Appleton: Provided that the said railroad from the said Stevens' Point to Superior shall be surveyed, located, constructed, maintained, and operated by the company hereby created jointly and in common with any railroad company that may be authorized by act of the legislature to locate, construct, and operate a rail-
37 road from Portage City, in the county of Columbia, to Superior aforesaid, by way of Stevens' Point aforesaid, and granted said company the right to consolidate with any railroad company that might by act of the legislature be authorized to consolidate with the company thus created, upon terms to be mutually agreed upon; in which case the said railroad from said Stevens' Point to Superior shall from the time of such consolidation be located, constructed, maintained, and operated by the corporation arising therefrom.

The grant contains all the provisions common to railroad charters and the eighth, ninth, tenth, twenty-eighth, thirty-first, thirty-second, and thirty-third sections are as follows:

"SEC. 8. The company hereby created shall be entitled to and invested with the title to one equal undivided half of the lands pertaining to that portion of the road of said company which shall be so located and constructed from the said Stevens' Point to Superior, and all and singular the rights, privileges and immunities granted or conferred, or intended to be granted or conferred, by section three of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864. Said company shall also be subject to all the restrictions, impositions, duties and obligations contained in said act of Congress, so far as the same are applicable to the company hereby created, or to the road hereby authorized to be constructed: Provided, that the title to the lands in this section mentioned and contemplated shall not vest in said company sooner or faster than the lands might be sold, as provided and declared in the aforesaid act of Congress, and the said lands are hereby granted in consideration of the company so hereby created complying with the terms of the grant hereby made, and of the aforesaid act of Congress: Provided, that whenever the company hereby created shall become consolidated with any other railroad company, as in this act authorized, such consolidated company shall become entitled to and invested with the title to all the lands granted by said act of Congress, pertaining to that portion of said railroad between the said Stevens' Point and Superior, and to all or any other portion of other lands which have been or may hereafter be granted by act of Congress
38 or of the legislature of this State to any road of said companies so consolidated, as shall be determined or settled in articles of consolidation between said companies."

"SEC. 9. The governor of this State, on the request of the president of the company hereby created, shall, without delay, from time to time upon the completion of any and every twenty continuous miles of the railroad or railroads in this act authorized to be con-

structed, certify the fact of such completion to the Secretary of the Interior, in accordance with the provisions of the aforesaid act of Congress."

"SEC. 10. If, when the line or lines of road authorized to be constructed by and under the provisions of this act, is or are located and definitely fixed by resolution adopted by the board of directors of the company hereby created, it shall appear that the United States have sold the whole or any part of any odd-numbered section granted by section three of the aforesaid act of Congress, or that a right of pre-emption or homestead has attached to the same, as is mentioned or contemplated by the aforesaid act of Congress, then the governor aforesaid shall, without delay, appoint such persons agents as to him shall seem proper, or as shall by said company, by resolution adopted by its board of directors, be designated by him, and whose duty it shall be to select other lands in lieu of those so sold by the United States, or to which the right of pre-emption has attached, according to the true intent and meaning of the aforesaid act of Congress; and such agents shall, at the expense of the company hereby created, select such other lands according to their appointment, and as is provided by the third section of the aforesaid act of Congress: Provided, that such lands shall be selected within three years after the acceptance of the grant of land for railroad purposes, by the company hereby created. And said agents shall certify their selections to the governor from time to time, and with all convenient speed, and the governor shall thereupon, without delay, make known to the Secretary of the Interior the selections thus made; and so far as the selections shall be approved by the Secretary of the Interior, said selections shall be made and like proceedings had, from time to time, as in this section provided, until the whole amount of land is selected and approved, as is mentioned or contemplated by the third section of the aforesaid act of Congress."

"SEC. 28. In case any other railroad company now organ-
39 ized under the provisions of any law of this State shall have surveyed and definitely located or in part constructed a line of railroad along or upon, or nearly along or upon, the proposed line of railroad hereby authorized, the said company shall have power to make such arrangements for the purchase of or consolidation or connection with such other line of railroad, or such railroad company, as may be agreed upon by and between the said railroad companies. For the purposes of such purchase or consolidation the company hereby created shall have power and authority to issue its stock in lieu of or in exchange for the stock of such other railroad company; provided, that no person shall be credited upon any stock so issued with the payment of any greater sum thereon than the amount actually paid in upon the stock in lieu of or in exchange for which such stock is issued, nor shall the amount so paid in be in any case less than five per cent. of the amount of stock so issued."

"SEC. 31. The avails or proceeds of the lands hereby granted to said company shall be used exclusively for the construction of the

railroad authorized by this act, and as herein directed, and for no other purpose. The said lands are by this act granted to said company, subject to all the provisions, restrictions and limitations of the act of Congress granting the said lands to this State for the purpose of aiding in the construction of certain railroads in this State, approved May 5, 1864, so far as the same are applicable thereto."

"SEC. 32. It is hereby declared that in the judgment of the legislature of this State the objects of the corporation hereby created cannot be attained under general laws."

"SEC. 33. This act is hereby declared to be a public act, and the same, immediately after the passage thereof, shall be printed by the State printer, and thus published shall take effect and be in full force.

"Approved April 6, 1866."

Eighteenth. Also chapter 362, Laws of Wisconsin, 1866 (Land Grant Case, 1129–1156). This act creates the Portage & Superior Railroad Company, a corporation with power to survey, locate, construct, complete, operate, etc., a railroad, with one or more tracks or lines, from the city of Portage, in the county of Columbia, by the way of Stevens' Point, in the county of Portage, to Bayfield, thence to Superior, on Lake Superior: Provided that the said railroad from said Stevens' Point to Superior shall be located, constructed, maintained, and operated by the said Portage & Superior Railroad Company jointly and in common with any railroad company that may be authorized by act of the legislature to locate, construct, and operate a railroad from Doty's island, in the county of Winnebago, to Superior aforesaid by way of Stevens' Point aoresaid, having like powers, privileges, and interests as are hereby conferred upon the company created by this act so far as relates to the line of said railroad from Stevens' Point to Superior; and provided further that the said Portage & Superior Railroad Company may at any time consolidate with any railroad company that may by act of the legislature be authorized to consolidate with the said Portage & Superior Railroad Company upon terms to be mutually agreed on, in which case the said railroad from Stevens' Point to Superior shall from the time of such consolidation be located, constructed, maintained, and operated by the corporation arising therefrom.

Sections 3, 8, 9, 10, and 11 are as follows:

"SEC. 3. The company hereby created is authorized and required to locate and construct the line of road authorized by this act to be constructed, from the said city of Portage by the way of the city of Ripon, in the county of Fond du Lac, and the city of Berlin, in the county of Green Lake, to Stevens' Point, and thence to Bayfield and to Superior, on Lake Superior; provided that the Congress of the United States shall, prior to the 4th day of March, A. D. 1867, give its assent to the route of the said railroad from the city of Portage to Bayfield and to Superior on Lake Superior, as in this section prescribed, and shall consent to the selection and application of the lands granted to the State of Wisconsin by the third section of the act of

Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5th, 1864, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's island or Fond du Lac, in a northwestern direction to Bayfield, and thence to Superior, on Lake
41 Superior, for and to the line of the said railroad, as the same is defined and prescribed in this section, in the same manner and with the same effect as if the said railroad was located and constructed in strict accordance with and upon the route prescribed in said act of Congress. And the said Portage & Superior Railroad Company is hereby authorized and required to survey, locate, and construct a railroad from the city of Fond du Lac to a point of connection with the said main line in the city of Ripon, in case the said main line shall be constructed by the way of Ripon, which said railroad from Fond du Lac to Ripon shall be commenced at the same time the construction of the said railroad shall be commenced at the said city of Portage, and shall be constructed simultaneously with the said road between Portage and Ripon, and shall be completed to that point of connection in the city of Ripon as soon as the said railroad shall be completed from Portage to the city of Ripon; provided, that in case Congress shall not assent to the change of the route of the said railroad, as proposed in this section, within the time above specified, then the company hereby created shall faithfully execute the trust in accordance with the said act of Congress, and in that case nothing in this section contained shall be construed so as to impair any of the rights, privileges, and benefits conferred by this act."

"SEC. 8. The company hereby created shall commence the construction of its railroad at the aforesaid city of Portage, and for the purpose of estimating the amount of lands to which said company may be entitled on account of building such road, the said city of Portage shall be deemed the point of commencement; and the company shall be entitled to land in the manner specified by the act of Congress, and as herein provided, as the road progresses from the said city of Portage, but in no other manner: Provided, however, that the company or companies herein authorized may construct or authorize to be constructed so much of the road as may be on the designated route from Bayfield to Superior, on Lake Superior, or one hundred miles thereof, on the line of the designated route, in a southerly direction from Bayfield, and shall be entitled to receive all the lands applicable to that purpose as soon as the road may be constructed."

"SEC. 9. The company hereby created shall be entitled to and invested with the title of the lands, and all and singular the rights, privileges and immunities granted or conferred, or intended
42 to be granted or conferred, by section three of the act of Congress entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May 5, 1864: Provided, that the said Portage & Superior Railroad Company shall be entitled to and invested with an undivided one-half only of the said lands pertaining to that portion of the railroad

authorized by this act, which shall be so located and constructed from the said Stevens' Point to Superior; and provided further, that whenever the company hereby created shall become consolidated with any other railroad company, as in this act authorized, such consolidated company shall become entitled to and invested with all the lands granted by said act of Congress pertaining to that portion of said railroad between the said Stevens' Point and Superior, and to all or any other portion of other lands which have been or may hereafter be granted by act of Congress or the legislature to any road of said companies so consolidated, as shall be determined or settled by articles of consolidation between said companies. Said company shall also be subject to all the restrictions, impositions, duties and obligations contained in said act of Congress so far as the same are applicable to the company hereby created, or to the road hereby authorized to be constructed; provided, that the title to the lands in this section mentioned and contemplated shall not vest in said company sooner or faster than the lands may be sold, as provided and declared in the aforesaid act of Congress; and the said lands are hereby granted in consideration of the company so hereby created complying with the terms of the grant hereby made, and of the aforesaid act of Congress."

"SEC. 10. The governor of this State, on the request of the president of the company hereby created, shall, without delay, from time to time, upon the completion of any and every twenty continuous miles of the railroad or railroads in this act authorized to be constructed, certify the fact of such completion to the Secretary of the Interior, in accordance with the provisions of the aforesaid act of Congress."

"SEC. 11. If when the line or lines of road authorized to be constructed by and under the provisions of this act is or are located and definitely fixed by resolution adopted by the board of directors of the company hereby created, it shall appear that the United States have sold the whole or any odd-numbered section granted by
43 section three of the aforesaid act of Congress, or that a right of pre-emption or homestead has attached to the same, as is mentioned or contemplated by the aforesaid act of Congress, then the governor aforesaid shall without delay appoint such persons agents as to him shall seem proper, or as shall by said company, by resolution adopted by its board of directors, be designated to him, and whose duty it shall be to select other lands in lieu of those so sold by the United States, or to which the right of pre-emption was attached, according to the true intent and meaning of the aforesaid act of Congress; and such agents shall, at the expense of the company hereby created, select such other lands according to their appointment, and as is provided by the third section of the aforesaid act of Congress; provided that such lands shall be selected within three years after the acceptance of the grant of land for railroad purposes by the company hereby created. And said agents shall certify their selections to the governor from time to time, and with all convenient speed, and the governor shall thereupon, without delay, make known to the Secretary of the Interior the selec-

tions thus made, and so far as the selections shall be approved by the Secretary of the Interior, said selections shall be made and like proceedings had, from time to time, as in this section provided, until the whole amount of land is selected and approved, as is mentioned or contemplated by the third section of the aforesaid act of Congress."

And sections 29, 32, and 35 are as follows:

"SEC. 29. In case any other railroad company now organized under the provisions of any law of this State shall have surveyed and definitely located or in part constructed a line of railroad along or upon, or nearly along or upon, the proposed line of railroad hereby authorized, the said company shall have power to make such arrangements for the purchase of or consolidation or connection with such other line of railroad, or such railroad company, as may be agreed upon by and between the said railroad companies. For the purposes of such purchase or consolidation, the company hereby created shall have power and authority to issue its stock in lieu of or in exchange for the stock of such other railroad company; provided, that no person shall be credited upon any stock so issued, with the payment of any greater sum thereon than the amount actually paid in upon the stock in lieu of or in exchange for
44 which such stock is issued, nor shall the amount so paid in be in any case less than five per cent. of the amount of stock so issued."

"SEC. 32. The avails or proceeds of the lands hereby granted to said company shall be used exclusively for the construction of the railroad authorized by this act, and for no other purpose. The said lands are by this act granted to said company, subject to all the provisions, restrictions and limitations of the act of Congress granting the said lands to this State, for the purpose of aiding in the construction of certain railroads in this State, approved May 5, 1864, so far as the same are applicable thereto."

"SEC. 35. This act is hereby declared to be a public act, and the same, immediately after the passage thereof, shall be printed by the State printer, and thus published shall take effect and be in full force.

"Approved April 9, 1866."

Nineteenth. Chapter 257 of the Laws of Wisconsin for 1869 (Land Grant Case, 1177), as follows:

"SECTION 1. The Portage & Lake Superior Railroad Company and the Winnebago & Lake Superior Railroad Company are hereby authorized to consolidate as one company, to be known as the 'Portage, Winnebago & Superior Railroad Company,' upon the terms and conditions contained in articles of consolidation to be duly executed by the president of each company, and assented to by a majority of the directors of each of said companies, and filed in the office of the secretary of state, or by a majority of the directors of each of said companies; and on filing such articles of consolidation duly signed by a majority of the directors of each of said companies or by the said presidents, assented to by the directors as aforesaid, in the office of secretary of state, said companies shall be deemed

to be consolidated under the name aforesaid, and said company shall therefrom become and be a corporation, with all the rights, powers, privileges, grants and franchises which were of and pertaining to the Portage & Lake Superior Railroad Company and the Winnebago & Lake Superior Railroad Company, under the provisions of their respective acts of incorporations; provided, that said consolidated company shall faithfully apply the lands or the funds arising from the sale thereof, granted by Congress, in aid of the construction of railroads authorized by the charter of the companies
45 hereby authorized to consolidate, to the building of both of said roads, in the manner as provided in the charters of said companies.

"SEC. 2. This act is declared a public act, and shall take effect upon its passage and publication.

"Approved March 6, 1869."

Twentieth. Also chapter 27 of the Laws of Wisconsin, 1871 (Land Grant Case, 1202, 1203), as follows:

"SECTION 1. The name of the Portage, Winnebago & Superior Railroad Company is hereby changed to and shall hereafter be known as the 'Wisconsin Central Railroad Company,' and under that name said company shall have and possess, and may use, exercise and enjoy all the rights, powers, privileges, trusts, property and franchises which by law were granted to or conferred upon or which have been acquired by the railroad companies mentioned in articles of consolidation filed in the office of secretary of state of Wisconsin on the 24th day of May, 1869, consolidating said companies, as authorized by law, in and as one company, under the said name of the Portage, Winnebago & Superior Railroad Company, and all the rights, powers, privileges, property and franchises by law granted to or conferred upon or acquired by the railroad companies which have heretofore become consolidated with the said Portage, Winnebago & Superior Railroad Company, and which may hereafter become consolidated with the said company, under the name of the 'Wisconsin Central Railroad Company.'

"SEC. 2. That the said company, by and under its name of Wisconsin Central Railroad Company, may excute and have executed unto it any contracts made under its said name of Portage, Winnebago & Superior Railroad Company, with any person or persons, parties or municipal corporations for the delivery of stock, bonds or other securities, the same and with like force and effect as though its name had not been changed; and the directors of said company shall be and are hereby authorized and empowered to fill any vacancy which may at any time exist in their board. Any stockholder in said company shall be eligible to the office of director, whether his residence be in or out of this State.

"SEC. 3. This act is hereby declared to be a public act, and shall be immediately published by the State printer, and take effect from and after its passage.

"Approved February 4, 1871."

46 Twenty-first. Act of Congress of March 3, 1875, volume 18, United States Statutes, page 511, as follows:

"Be it enacted, etc., That the consent and approval of Congress are hereby given to the Wisconsin Central Railroad Company to build that portion of their road which lies between Portage City and Stevens' Point on the line adopted by the act of the legislature of Wisconsin, approved February tenth, eighteen hundred and seventy-five, instead of the line adopted by the act of the legislature of Wisconsin April ninth, eighteen hundred and sixty-six, chartering the Portage & Superior Railroad Company: Provided, that no portion of the lands belonging to said grant situated south of Stevens' Point, and which may be found outside of the ten-mile limits, measured from the modified line of said road, shall pass to said company under its grant, but such lands shall revert to the United States and become part of the public domain, to be disposed of as other public lands, and the acceptance of the provisions of this act by said company shall be held to be a relinquishment of the same; and provided further, that this act shall not be construed as increasing said grant or as granting to said company and (any) lands whatever."

Twenty-second. Plaintiff here gave in evidence a map of definite location of the line of its road north and west of township forty-three and coterminous with the lands in controversy, together with a certified copy of a letter, dated December 10, 1869, from the Commissioner of the General Land Office to the register and receiver at Bayfield, Wisconsin, as follows:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *December* 10, 1869.

"Register and receiver, Bayfield, Wis.

"GENTLEMEN: I enclose herewith a diagram of the Portage, Winnebago & Superior railroad under act May 5, 1864, third section, and joint resolution 21st June, 1866, with the ten and twenty mile limits of the land grant designated thereon.

"You are hereby directed to withdraw from sale or location, pre-
emption, or homestead entry all the odd-numbered sections
47 of lands falling within those limits and to regard as increased in price to $2.50 per acre all the even-numbered sections within the ten-mile or granted limits.

"The even sections between the ten and twenty mile limits are not affected by this withdrawal.

"The lands herein increased to $2.50 per acre you will dispose of only under the pre-emption and homestead laws and at that ratability except in case of *bona fide* pre-emption settlements prior to the receipt of this letter of withdrawal. In such cases the settler will, under the provisions of the act of March 27, 1854, be permitted to prove up and pay for his land, whether upon odd or even sections, at $1.20 per acre.

"This order will take effect from the date of its receipt by you, and you are requested to acknowledge the same by date.

"Very respectfully, JOS. S. WILSON,
"*Commissioner.*"

Said map is marked for identification "Wisconsin Central Railroad Company *vs.* William O. Forsythe, June 16, 1891, No. 1, Romanzo Bunn, district judge," and will be produced as part of the record at the hearing.

The joint resolution of 1866 above mentioned is found in 14 U. S. Stat., 360, and is as follows:

"Resolved, etc., That the words 'in a northwestern direction' in the third section of the act entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' approved May fifth, eighteen hundred and sixty-four, shall, without forfeiture to said State or its assigns, of any rights or benefits under said act, or exemption from any of the conditions or obligations imposed thereby, be construed to authorize the location of the line of said road, in said third section provided for, along and upon the following route, that is to say: from the city of Portage, by the way of the city of Ripon, in the county of Fond du Lac, and the city of Berlin, in the county of Green Lake, to Stevens' Point, and thence to Bayfield, and thence to Superior, on Lake Superior. And the legislature of the said State of Wisconsin having in and by an act entitled 'An act to incorporate the Portage & Superior Railroad Company, and to execute the trust created by section three of the act of Congress entitled "An (act) granting lands to aid in the construction of certain railroads in the State of Wisconsin," approved May fifth, eighteen hundred and sixty-four,' approved April —, eighteen hundred and sixty-four, authorized and required the said Portage & Superior Railroad Company to construct the line of road in the said third section of the said act of Congress provided for, upon and
48 along the route hereinbefore set forth and described, the Congress of the United States hereby gives its assent to the route of the said railroad, as the same is hereinbefore described and set forth, and consents to the selection and application of the lands granted to the State of Wisconsin by the third section of the said act of Congress hereinbefore mentioned, for and to the line of the said railroad, as the same is hereinbefore defined and described, in the same manner and with the same effect as if the said railroad was located and constructed in strict conformity with and upon the route prescribed in the said third section of the said act of Congress. It being the intention of this resolution to give the assent of the United States to the disposition made by the legislature of the State of Wisconsin of the land grant herein referred to and the change of route for the railroad in aid of which the same is granted, and not to make any other disposition, change or alteration of the grant aforesaid."

And also an act of Congress of April 9, 1874, 18 U. S. Stat., 28, extending the time for the completion of the road mentioned in the third section of the act of May 5, 1864, until the 31st December, 1876.

Twenty-third. The plaintiff offered in evidence certified copy of certificate and proofs of completion of the first section of twenty miles of the plaintiff's road from Ashland south and coterminous with the lands in question, showing that the same had been so

completed by the 19th day of October, 1873, together with a map of said completed section.

Twenty-fourth. Plaintiff gave in evidence a certified copy of diagram on file and in use in the General Land Office, at Washington, of the place and indemnity limits of said completed section.

Said map and diagram are marked for identification "Wisconsin Central Railroad Company *vs.* William O. Forsythe, June 16, 1891, Nos. 2 & 3, Romanzo Bunn, district judge," and will be produced at the hearing as part of the record.

From these maps and diagrams it is shown that the lands in question are within the ten-mile place or granted limits of the line of the Wisconsin Central railroad and outside of the ten-mile granted limits of the Bayfield branch, but within the fifteen-mile indemnity limits of the old location and withdrawal under the act of June 3, 1856.

49 Twenty-fifth. The plaintiff gave in evidence the following decisions and orders of the Secretary of the Interior, namely:

Secretary Lamar to Commissioner Sparks, October 6, 1887 (6 L. D., 190–194):

"I have before me two letters from W. K. Mendenhall, Esq., attorney of the Wisconsin Central Railroad Company, both dated April 3, 1883. One of said letters asks that you be instructed to submit for my approval a list of the lands claimed by said company 'opposite to and coterminous with the road constructed prior to December 31, 1876, the date of the expiration of the grant.' The other letter asks that you be instructed to send up for my approval certain lists of lands selected by said company as indemnity lands in place lost by sales, etc., as provided in the granting act; which lists are on file in your office, unacted upon.

"I have also before me a communication, under date of November 19, 1883, from Mr. Edwin A. Abbott, in behalf of the bond and stock holders of said company, and also as attorney for the State of Wisconsin, urging that patents be issued to said company for the residue of its land grant according to the lists now on file in your office. Mr. Abbott states that under decisions of the State courts it is held that, the equitable title being absolutely vested in the company, the said lands are taxable as their property, and certain towns and counties have sold the same for taxes and parties are in possession under tax deeds, and thus, under color of title, are enabled to cut and remove the valuable timber upon large tracts of land, whilst the company, being without legal title to said land in the absence of patents, is unable to recover the same or protect its interests therein, and that the unsettled condition of the title to these lands is greatly retarding the development of that country.

"I am also in receipt of your letter of February 24, 1886, inclosing copy of report of Special Agent Speer relative to alleged timber trespasses by employees, agents, and subcontractors of the Wisconsin Central Railroad Company upon lands in townships 38, 39, and 40 N., ranges 4 and 5 E., Wausau land district, Wisconsin.

"It is stated that the company admits the cutting of timber,

50 but denies the trespass, claiming that said lands are within

the indemnity limits of the grant to said road, and that selections of said tracts were duly made by the company and filed in your office, but as yet have not been acted upon. Inasmuch as legal title to said tracts of land has not yet been conveyed to said company, you recommend that the Attorney General be requested 'to cause its officers and agents to be restrained from cutting or disposing of the timber cut' upon said lands.

"In considering your recommendation and the application referred to it is necessary to examine the claims of said company and the legislation under which they arise.

"By the third section of the act of May 5, 1864 (13 Stat., 66), there was granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Portage City or Fond du Lac, as might be determined, in a northwestern direction to Bayfield, thence to Superior, on Lake Superior, every alternate odd-numbered section of public land for ten sections in width on each side on the same terms and conditions as contained in the act of June 3, 1856 (11 Stat., 20), with a right to take indemnity lands within twenty miles of the line of the road.

"The seventh section of the act provided that when 'twenty consecutive miles of any portion' of said road was properly completed to the satisfaction of the Secretary of the Interior patents shall issue conveying to the company title to the lands 'on each side of the road, so far as the same is completed,' and in like manner as each twenty miles is completed.

"Section nine of said act further provided 'that if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this act as provided herein no further patents shall be issued said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States.'

"The Wisconsin Central Railroad Company became and is entitled to the benefit of the land grant made by this grant.

"By act of April 9, 1874 (18 Stat., 28), the time for the completion of said road was 'extended until the 31st day of December, 1876.'

"Prior to this last date the entire line of the road from Portage City northerly to Ashland was completed, except a gap of about nine
miles lying north of sec. 21, T. 41 N., R. 1 W. (Butternut
51 creek), and south of sec. 11, T. 42 N., R. 2 W. (Chippewa crossing), which portion was completed May 30, 1877, four months after the time limited by law.

"No portion of the road provided for between Ashland and Superior has yet been built and is not likely to be, because the intersection of the constructed road a short distance south of Ashland by the Northern Pacific railroad renders the construction of such line unnecessary and unprofitable. The company has from time to time received patents for portions of the land along its line, but yet claims patents for lands within both granted and indemnity limits.

"The lands upon which the trespasses mentioned in your letter are stated to have been committed are within the indemnity limits of that portion of the Central Wisconsin railroad which was com-

pleted prior to December 31, 1876, or within the time limited by law; and if the said railroad company is entitled to indemnity for lands in place lost along that portion of its line which was properly constructed in time, and the lands cut upon have been selected as such indemnity lands, I do not see the advisability of restraining them from the use of said lands because said selections have not yet been acted upon by your office, said company having done all in its power to obtain complete title to said lands, supposing that in such case a court of equity would grant the injunction sought, of which I have the gravest doubts.

"Unless there be some legally sufficient reason to the contrary, I think that the adjustment of the grant to aid in the construction of said road should be forthwith proceeded with, selections of granted and indemnity lands submitted for my approval, rather than to institute legal proceedings against the company, from which it would have been amply protected if the Land Department had not delayed the issue of patents for lands earned ten years ago.

"My views on this subject were plainly expressed in the case of the Wisconsin Farm Mortgage Land Company (5 L. D., 91) and that of the Chicago, St. Paul, Minneapolis & Omaha Railway Company (*id.*, 511), both of which cases arose under grants made by the acts of Congress hereinbefore recited, and both of which decisions related to indemnity selections, and the last was made in response to a recommendation by you that the Attorney General be requested to obtain an injunction prohibiting the Omaha Railroad Company from cutting upon lands within its indemnity limits the
52 selections for which had not yet been approved. The recommendation was denied, and you were requested to adjust said grant and transmit lists of said selections for my approval.

"It is said, however, there is a difference between the grant in that case and the one under which the Central Wisconsin railroad was built. The difference alluded to is to be found in the ninth section of the granting act of May 5, 1864, *supra*, which declares that if the road under consideration is not completed within the time fixed by law 'no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States.'

"The last part of said section, declaring that 'no further sale shall be made and the lands unsold shall revert to the United States,' is common to all the grants made to Wisconsin by the acts of 1856 and 1864, and was construed by the Supreme Court in the case of Schulenberg *v.* Harriman (21 Wall., 44).

"The court said: 'The provisions in the act of Congress of 1856 that all lands remaining unsold after ten years shall revert to the United States if the road be not then completed is no more than a provision that the grant shall be void if a condition subsequent be not performed. * * * The prohibition against further sales if the road be not completed within the period prescribed adds nothing to the force of the provision. A cessation of sales in that event is implied in the condition that the lands shall then revert; if the condition be not enforced the power to sell continues as before its

breach, limited only by the objects of the grant and the manner of sale prescribed in the act.'

"The act of 1856, which the court was here construing, did not provide for the issue of patents, but the seventh section of the act of 1864 declared that upon the completion 'of twenty consecutive miles of any portion of said railroads * * * patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed and coterminous with said completed section.'

"It seems to me, in view of the language of the Supreme Court, that the prohibition against the issue of patents, like the prohibition against further sales, 'adds nothing to the force of the provision.' It is but the expression of that which was necessarily implied.

53 The provision that the lands should revert on the happening of the contingency necessarily implied equally the non-issue of patents and the stoppage of sales. The whole section and the whole act must be construed together and the object of Congress ascertained. The Supreme Court say that object was 'no more than a provision that the grant shall be void if a condition subsequent be not performed. Upon failure to perform the condition subsequent it was in the power of Congress alone to declare the forfeiture, and if the forfeiture was not enforced the court says 'the power to sell continues as before its breach, limited only by the objects of the grant and the manner of sale prescribed by the act.'

"No forfeiture having been declared in relation to this grant, the power of sale thereunder continues as though no breach of condition had occurred, and the parties in interest are entitled to patents as evidence of their title as to all the lands along the constructed portion of said road, and for indemnity lands for such as have been lost.

"On August 15, 1887, an order was issued revoking the indemnity withdrawals heretofore made for the benefit of the grant to the Wisconsin Central road and directing the restoration of the lands within the indemnity limits to the public domain, and that filings and entries thereon should be received after thirty days' notice. An application has been made to me in behalf of said company to suspend the said order of revocation and restoration until such time as the pending selections of lieu lands shall have been acted upon.

"It is represented that the lands in question are only valuable for the timber growing on them, and that this makes them very valuable; that if the order of revocation is permitted to go into effect a large number of persons will, under pretext of the lands being thrown open to the public, go upon the lands covered by pending selections and speedily denude them of the timber for which alone said lands are of any value; that it would be impossible for the company to protect its interests in the premises otherwise than by obtaining an injunction from the local courts against every individual squatter, and this would cause an immense amount of litigation and entail undue expense and trouble on the company. In short, it is earnestly urged that the circumstances of the case make it an exception and

bring it within the equitable rule which grants relief in order to avoid a multiplicity of suits or where the injury is irreparable.

54 "I recognize the force of these arguments and facts; but after careful consideration must decline to suspend the order of revocation as asked. An early adjustment of this claim will obviate the greater part of the injuries to the company apprehended, and certainly correct those which may in the meantime occur.

"These matters thus pressed upon me were all thought of and carefully weighed prior to the issue of the order of revocation in relation to this and other roads, and further consideration confirms the conclusion then arrived at, that it was the duty of the department to remove all objects in the way of the settler who desires to locate upon public lands within indemnity limits to which the railroad company has acquired no rights. Ample security is afforded for the protection of any rights acquired by the company, whilst the opportunity is also afforded the settler to challenge selections improperly made.

"No exception has been made to the orders of revocation in favor of any company except the Chicago, St. Paul, Minneapolis & Omaha Railroad Company. The adjustment of that grant had been made by you, transmitted to this department; exceptions taken to your adjustment and argument thereon had prior to the issue of the order of revocation in relation to that road, so that at the time of the issue of the order in that case the adjustment of its grant was under consideration here, the department was ready to act, and a suspension was properly ordered.

"But in view of the strong equities presented, I direct that you will specially advance the adjustment of this grant and transmit lists for approval at the earliest possible moment."

Also decision in the case of the Chicago, St. Paul & Omaha Railway Company, Secretary Lamar to Commissioner Sparks, October 7, 1887 (6 L. D., 196–209), as follows:

"On March 22d last you were directed to cause to be adjusted the land grant to the Chicago, St. Paul, Minneapolis & Omaha Railway Company in Wisconsin and transmit for my approval proper lists of lands selected by said company within the indemnity limits of its grant. On August 3d you transmitted list No. 1, embracing 82,805.25 acres, which was approved by me and on August 13th returned to you.

55 "From your said letter it appears that the acreage within the odd-numbered sections along the main line, under both grants, amounts to 857,957.53

"From which are to be deducted:

The number of acres in the granted limits heretofore approved	498,605.08
The number of acres in the granted limits yet subject to the grant	42,124.73
The number of acres in the indemnity limits heretofore approved	30,682.79

The number of acres in list No. 1, transmitted for approval and since approved by me	82,805.26
The losses in granted limits, for which you say no indemnity should be allowed	203,739.67
	857,957.53

"So that from your statement it would appear that the company has received all it is entitled to.

"The 203,739.67 acres for which you hold no indemnity should be granted are made up of several items. Of this total amount, 39,026.28 acres are deducted because double that number of acres are within the overlapping limits of the Bayfield branch of said road, within which limits each company is entitled to one-half only of the granted lands. Inasmuch as the grant for the main and branch line were made by the same act, the correctness of this deduction is not questioned by the company.

"Of the balance of the amount deducted, 44,782.42 acres are on account of lands which passed to the State under the swamp-land grant and two other acts granting lands to it for purposes of internal improvement, all of said grants being prior to that made to the railroad company.

"The act of June 3, 1856 (11 Stat., 20), granted to the State of Wisconsin for the purpose of aiding in the construction of this road 'every alternate section of land, designated by odd numbers, for six sections in width on each side' of said road.

"It also provided if, at the time said road was definitely located, it should appear that the United States had 'sold any sections * * * granted as aforesaid' the State might select from
56 lands of the United States 'nearest to the tiers of sections above specified so much land in alternate sections as shall be equal to such lands as the United States have sold or otherwise appropriated,' said lands so located not to be further than fifteen miles from the line of the road.

"By the act of May 5, 1864 (13 Stat., 66), there was granted to the State in aid of this road 'every alternate section of public land designated by odd numbers, for ten sections in width, on each side of said road, deducting any and all lands that may have been granted * * * for the same purpose by act of Congress of June 3, 1856, upon the same terms and conditions as are contained in said act of 1856.'

"It is further provided that if at the time of the definite location of said road it appears that the United States have 'sold, reserved, or otherwise disposed of any sections * * * granted as aforesaid,' then selections may be made 'from the public lands of the United States nearest to the tiers of sections above specified, of as much land in alternate sections * * * as shall be equal to such lands as the United States have sold or otherwise appropriated,' the lands so located not to be further than twenty miles from the line of the road, and no selection to be made 'in lieu of lands received under said grant of June 3, 1856, should any such deficiency exist.'

"Both the act of 1856 and that of 1864 contained the common provision that 'all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner or for any purpose whatever' should be excluded from the operation of the act, except so far as may be necessary to locate the right of way through the same.

"The map of definite location of the line of road now under consideration, from the St. Croix river to Lake Superior on the north, was filed on March 2, 1858, under the provisions of the act of 1856, but the work of constructing the road was not commenced until some time after the passage of the act of 1864.

"The indemnity granted by both acts was for losses ascertained at the time of the definite location because, under the act of 1856, of land 'sold or otherwise appropriated' by the United States, and under the act of 1864 because of land 'sold, reserved, or otherwise disposed of' or 'sold or otherwise appropriated.'

"It would seem that lands which had been previously
57 granted under either the swamp-land grant or the two other internal improvement grants to said State had been, if not 'sold,' certainly 'otherwise appropriated' or 'reserved or otherwise disposed of' by the United States, and for all such losses which had taken place prior to the definite location of the road the company is entitled to indemnity lands unless there is something else in the law to the contrary.

"It is not stated in your letter why the company is not entitled to indemnity for lands thus lost, but it is inferred from the language used that you are of the opinion that the provisions in each act which excludes from the operation thereof 'all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner or for any purpose whatever' requires that you should deny to the company the indemnity which otherwise it would be entitled to.

"Whatever strength may have formerly been in this position was completely destroyed by the decision of the Supreme Court in the case of The Winona & St. Peter R. R. Co. *v.* Barney, 113 U. S., 618.

"The grant in that case was by act of March 3, 1857 (11 Stat., 195), to the then Territory of Minnesota, to aid in the construction of certain railroads therein, and is almost identical with that of 1856 to Wisconsin. It was 'for every alternate section of land designated by odd numbers for six sections in width on each side of said road,' etc. The indemnity clauses were the same, providing that in case of losses ascertained at the time of definite location because of any of the 'granted' sections being 'sold,' then selection could be made of other lands of the United States within the indemnity limits of an amount 'equal to such lands as the United States have sold or otherwise appropriated,' etc. The act also contained the same provision as to lands reserved by Congress or otherwise for works of internal improvements or other purposes.

"The Supreme Court, in the case referred to, held that the proper construction of the granting act was as though Congress had said, 'We give to the State certain land to aid in the construction of rail-

ways lying along their respective routes, provided they are not already disposed of or the rights of settlers have not already attached to them when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of or the rights of settlers have attached to them, other and equivalent lands may be selected in their place, within certain prescribed limits.'"

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"In continuation, the court says:

"'It is to no purpose to say, against this construction, that the Government could not grant what it did not own, and therefore could not have intended that its language should apply to lands which it had disposed of. As already said, the whole act must be read to reach the intention of the law-maker. It uses, indeed, words of grant—words which purport to convey what the grantor owns—and, of course, cannot operate upon lands with which the grantor had parted; and therefore, when it afterwards provides for indemnity for lost portions of the lands "granted as aforesaid," it means of the lands purporting to be covered by those terms.'

"The court then reviews the case of The Railroad Company *v.* Baldwin, 103 U. S., and that of Leavenworth, Lawrence & Galveston R. R. *v.* United States, 92 U. S., and declares that neither of said cases, properly considered, presents antagonistic views, and that if the language in the last case must be so construed it was mere dictum and not to be regarded.

"This plain language of the Supreme Court in the Barney case seems to be conclusive of the questions presented, and to hold that lands so reserved for works of internal improvements when found within either granted or indemnity limits are not to be taken under the railroad grant; but if such lands are of the designated sections, within the primary or granted limits of the road, then the company is entitled to indemnity for all such lands so lost to the grant.

"The force of this clear exposition of the law in the Barney case is sought to be broken by the assertion that the grants to Minnesota, then being construed, were of the alternate odd-numbered sections 'of land,' whilst the grant to Wisconsin of 1864 is for the designated sections of 'public land.' It is claimed that there is or ought to be a distinction between the two grants because of this want of identity in language; that in the Minnesota case, the grant being 'of land,' it could be consistently held that Congress, as stated by the court, intended its beneficiary should have the designated quantity, if the same could be obtained within either the granted or indemnity limits; but that in the other case Congress intended only to give the designated quantity of land, provided it could be found within the granted limits and was at the date of the grant 'public land'—that is, free and unappropriated—and that as to deficiencies in such land no indemnity was contemplated or granted. A discussion of this question is not necessary to a determination of the matters involved in this case.

59

"By the act of 1856, entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in that State,' is granted for this road 'every alternate section of land,'

etc.; subsequently the act of 1864, entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' was passed, whereby was granted for the same road 'every alternate section of public land,' etc.; and it is expressly stated by the terms of this last act that these additional sections are granted for the same purpose and 'upon the same terms and conditions as are contained' in the original granting act; thus Congress makes out of the public domain an original grant of land, and afterwards, also from identically the same public domain and expressly and specifically for the same purposes and upon the same terms and conditions, makes an enlargement of the grant, and in doing so employs, as it seems to me, the two terms, not as contradistinguished, but as denoting the same subject-matter. If there be any force in the argument that the two terms in question have, as used by Congress in other places, a different meaning it seems evident that in the title and all through these acts they are both interchangeably employed. So far as this case is concerned, therefore, the arguments and inferences based upon such differences of meaning have no application.

"But independent of the foregoing, the grants under which the Omaha Company claims have been the subject of judicial construction. The matter was before the United States circuit court in Wisconsin in 1879 in the case of the Madison & Portage R. R. Company *v.* The State *et al.* Mr. Justice Harlan, of the United States Supreme Court, delivering the opinion in that case, said:

"'Some question has been made as to the precise extent of the grant under the two acts of Congress. We understand that it covers six sections in width on each side of the line in the one case and ten sections in the other of lands in place as they existed on the ground, so that if any of these sections were fractional or from any cause were not full sections the State could not make up the deficiency from the lands in the indemnity limits, because as to
60 the lands in place the act operates by specific description; but when there was not land in place to meet the call of the grants, whether the deficiency was more or less, it was competent to supply it by sections from indemnity limits.'

"It seems here is a judicial construction which leaves no further room for discussion. When questions relating to the construction of these grants were passed upon by your office in respect to the claim of the Wisconsin Farm Mortgage Company you declined to adopt the views of Mr. Justice Harlan as stated. When the case of the mortgage company came before this department on appeal your action was reversed, and it was said as to Judge Harlan's decision (5 L. D., 92):

"Whether binding upon the department or not in the sense you refer to, it is a decision of very high and persuasive authority. If the question were one of doubt, the safe rule of administrative action would lead me to accept it as authoritative in the conduct of executive business and to adhere to the practice heretofore and for so many years enforced; but in my view the case is free

from doubt, and the decision of said court rests upon sound and well-established legal principles.

"When the matter of this grant came before this department again (5 L. D., 511) the decision in the case of the mortgage company was referred to and approved, and you were directed to adjust the grant of the Omaha Company in accordance therewith. I see no reason for changing the views then reiterated.

"I therefore reverse your action as to the denial of indemnity for the 44,782.42 acres covered by the swamp-land grant and internal improvements acts.

"The next item to be considered is the deduction of 56,619.84 acres on account of the overlapping limits of the Wisconsin Central railroad. The conflicting limits here alluded to are presumed to be along the main line of the Omaha road where it encounters the line of location of the Wisconsin Central, between Bayfield and the west end of Lake Superior, and which portion of road has not yet been built by the last-named company.

"It is stated by counsel for the Omaha Company that no claim is made by the Wisconsin Central to the lands thus found to be in the conflicting limits; and as evidence of this fact reference is made to a formal relinquishment thereby by the Central Company on file in your office. No mention is made of the relinquishment in
61 your letter, but I have inspected the same and find it to be a surrender and waiver in favor of the Omaha Company on the part of the Central Company 'of its right of whatsoever nature to claim or select any lands lying within the overlapping limits' of the two roads under the grant to the State, and which lands are seemingly described with much particularity.

"Inasmuch as the Central Company has not earned the lands along this part of its line by the construction of its road, the assignment is of little value in the present aspect of the case, as the right to the lands in the conflicting limits is one in which the interests of the Government are more deeply involved than those of that company.

"It is, however, claimed on the part of the Omaha Company that you erred in making said deduction, because, said company having definitely located the line of its road prior to 1858, and withdrawal having been made of the indemnity limits for the purposes of the grant of 1856 at the time of the passage of the act of May 5, 1864, making the grant to the Wisconsin Central, the lands within said six and fifteen miles limits were 'reserved' from the operation of the later grant, and that company has no right to come within those limits for the purpose of gratifying any portion of its grant. I think this position well taken, and that it cannot be successfully assailed either on principle or authority.

"Section six of the act of 1864, under which the grant to the Wisconsin Central is made, as before stated, declares that any and all lands reserved, etc., by act of Congress or in any manner for works of internal improvements or for any purpose whatever 'are hereby reserved and excluded from the operation of this act,' and

by the granting sections the right to indemnity for such lands, 'reserved or otherwise disposed of,' is given.

"The rule that lands reserved or otherwise disposed of are not to be considered as included in a subsequent grant by Congress is as old as the land system itself, and is too firmly settled through a long line of decisions by the Supreme Court to permit of any question at this late day, and it would be a waste of time to quote authorities to sustain an assertion that ought not to be questioned; but the case of Wolcott *v.* Des Moines Company (5 Wall., 681) is so apposite to the one now under consideratton that particular reference to it may be excusable.

62 "In 1846 Congress made a grant of land to the State of Iowa for the purpose of aiding in improvement of Des Moines river 'from its mouth to Raccoon fork.' The lands granted were to be taken 'in a strip five miles in width on each side of said river.' A question arose whether this grant embraced lands along the whole length of the river or only up to the point where Raccoon fork flowed into it. Pending this discussion the Land Department ordered a withdrawal from sale of the designated sections both above and below Raccoon fork. Subsequently the question of the proper construction of the grant came before the Supreme Court in the case of Dubuque & Pacific Railroad Co. *v.* Litchfield, 23 How., 63, and that tribunal held the grant did not extend above Raccoon fork.

"In the meantime and in 1856 Congress made another grant of land to the State of Iowa for the purpose of aiding in the construction of certain railroads, and the granting act contained the same proviso as hereinbefore quoted as to lands 'reserved' by Congress or otherwise for works of internal improvements, etc., being excepted from the operation of the grant. One of the roads under the grant to Iowa was located through the lands above Raccoon fork theretofore withdrawn for the benefit of the river grant; and the question in the Wolcott case was whether the lands within the former withdrawal could pass under the railroad grant or whether they were excluded as 'reserved' lands under the proviso. The court held, in effect, that inasmuch as the river grant had been decided not to extend above Raccoon fork the railroad company would have been entitled to the lands in question had it not been for the withdrawal made under the wrongful supposition they were embraced in the river grant, but that said withdrawal was such a 'reservation' as, under the proviso of the railroad act, excepted the land from that grant.

"Since this decision was announced, in 1866, the court has specially reaffirmed it in some half dozen or more cases, in which the question was presented under different aspects. Besides, the same case and the doctrines therein enunciated have been incidentally affirmed in innumerable other cases, and I find nothing in conflict therewith.

"I must, therefore, hold that the lands within the fifteen-miles limits of the withdrawal under the act of 1856 were 'reserved' from the grant under the act of 1864 in favor of the Wisconsin Central

Company, and that the Omaha Company is entitled to the
63 whole of the designated sections within the six-miles limits and to be indemnified for losses therein out of the designated sections within the fifteen-miles limits, to the exclusion of the other company as fully as though the grant to it had never been made.

"The same act of 1864 which made the grant of ten sections in width to the Central Company also made a like grant for the benefit of the road now owned by the Omaha Company, the effect of which grant to the last company, it is now claimed, was an enlargement to the extent of four sections of the original grant of 1856; that the title of said company to the enlarged quantity must be considered as taking effect equally with the title to the less quantity, as of the date of the first act, both as to the United States and the Wisconsin Central Company, and consequently that any claims the latter company may have to lands within the ten or twenty miles limits of the grant of 1864 must be in subordination to the prior rights of the Omaha Company to lands within the same limits, which, by virtue of the definite location of its road, followed by construction, took effect as of the date of the act of 1856. The cases of The Missouri, Kansas & Texas R'y Co. *v.* Kansas Pacific R'y Co., 97 U. S., 491, and of The United States *v.* Burlington & Missouri R. R. Co., 98 U. S., 333, are relied upon to sustain this position.

"I cannot concur in this view. The original grant of 1856, under which the Omaha Company now claims, was of the designated six sections and of indemnity to be taken within fifteen miles to aid in the construction of a continuous railroad from Madison or Columbus westward, via Portage, to the St. Croix river, thence northerly to the west end of Lake Superior and to Bayfield. The act of 1864 broke the continuity of the road provided for in the former act and granted the alternate odd-numbered sections of land for ten sections in width, with indemnity limits of twenty miles, to aid in the construction of a road from the St. Croix river to the west end of Lake Superior, with a branch to Bayfield, and in section two made a similar grant in aid of a road from Tomah to the St. Croix river, both grants stated to be upon the same terms and conditions as were contained in the said act of 1856, provided that no indemnity lands were to be selected under the act of 1864 in lieu of lands received under the act of 1856, and the third section of the act of 1864 made for the first time the grant of lands for the road now
known as the Wisconsin Central. Now, the grant here was
64 entirely different from that which was being considered by the Supreme Court in the cited cases in 97 and 98 U. S. Reports, *supra*. In those cases the act of July 2, 1864, amending the act of 1862 (12 Stat., 489), was being considered. The act of 1862 to aid in the construction of a railroad from the Missouri river to the Pacific ocean made a grant of five alternate odd-numbered sections per mile, to be taken within the limits of ten miles on each side of the road. The act of 1862 was amended by the act of 1864 "by striking out the word "five" where the same occurs * * * and inserting in lieu thereof "ten" and by striking out the word "ten" where the same occurs * * * and inserting in lieu thereof the

word "twenty;"' and the Supreme Court said in the case of United States *v.* Burlington & Missouri R. R. Co., *supra:*

"Now, the enlargement of the grant by the act of 1864 is not made * * * by words of a new and additional grant, but simply by altering the number of sections granted and the distance from the road within which they are to be taken. The numbers in the first act, says the amendment, shall be stricken out and larger numbers substituted, so that the act of 1862 must thenceforth be read, at least as against the Government and parties claiming under concurrent or subsequent grants, as though the larger number had been originally inserted in it. The Burlington & Missouri Railroad Company received its grant from the same act which declared that the act of 1862, in its grant to the Union Pacific, should be thus read. It must therefore take its rights to the land subject to the claim of that company.

"If the Wisconsin act of 1864 had amended the act of 1856 by providing that 'six' should read 'ten' and 'fifteen' 'twenty' the case would be exactly like those arising under the Union Pacific act and the contention of the Omaha Company would be sustained. But inasmuch as the act of 1864 does not thus amend the act of 1856, while in effect increasing the grant thereunder, I must hold, as to the overlapping lands derived under the respective grants made by the act of 1864, the different companies must be regarded as tenants in common.

"The next question to be considered is in relation to the deduction of 35,973.72 acres made by you because of the overlapping limits of the West Wisconsin Railroad Company.

"As just stated, the act of 1856 made a grant of lands to the
65 State to aid in the construction of one continuous road from Madison or Columbus northwesterly 'to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior,' etc. The grant was accepted by the State, and the right to build the entire road and receive the benefits of the grant was conferred upon the Milwaukee & La Crosse Railroad Company in October of the same year. In March, 1857, with consent of the State, the right to build that portion of the road running northward from the St. Croix river to Lake Superior, together with the benefits of the grant, was transferred to the St. Croix & Lake Superior Railroad Company. This part of the road, after several transfers, finally passed into the hands of the Omaha Company, and the other portion of the road from Madison to the St. Croix river, after more numerous transfers, finally passed into the hands of the West Wisconsin Company.

"The maps of the definite location of the entire line from Madison to the St. Croix river and thence to Lake Superior were filed at different times prior to July 7, 1858, but no part of the road was constructed prior to the passage of the act of May 5, 1864, except sixty-one miles between Portage and Tomah.

"From the map showing the definite locations, transmitted with your letter, it appears that the road approaching the St. Croix river from Madison met the road from Lake Superior at River Falls, a

point about seven miles east of the river; a single line was then continued in a southwesterly course to Prescott, on the St. Croix river, in township twenty-six. The line of road to Lake Superior was located from River Falls northwesterly to Hudson, on the St. Croix river, in township twenty-nine, and thence northerly to Lake Superior. Thus, by the map of definite location, the road went to two points on the St. Croix river, but both within the prescribed limits.

"The Omaha Company has constructed its road between Lake Superior and Hudson and from the last point south and easterly to River Falls, a distance of about ten miles, but has not built to Prescott.

"A few months after the passage of the act of 1864 the line of the West Wisconsin road was located anew. The former line to River Falls and Prescott was ignored, and a more direct line, further to the north, was adopted between Tomah and Hudson, the latter being the terminus on the St. Croix river. On this line the West
66 Wisconsin Company constructed its road; and it is understood that it is because of the lapping limits thus brought about—by the location of the Omaha Company in 1857 and that of the West Wisconsin in 1864—that the deduction of 35,973.72 acres is made by you.

"When the line of a land-grant railroad has once been definitely fixed by the filing and acceptance of its map there is no authority to change that location except the legislative, and in the absence of a legislative sanction the action of the land authorities in allowing or recognizing such change can neither confer nor take away rights.

"In the case of the West Wisconsin there was an implied right conferred by the act of 1864 to make a new location thereunder; but whether such right was given by that act or not it is unnecessary to discuss, inasmuch as such new location was made in 1864 and subsequently recognized and approved by Congress in the act of March 3, 1873 (17 Stat., 634). This act recites that whereas the Commissioner of the General Land Office had neglected to withdraw from market the lands embraced in the grant for a road from Tomah to Hudson 'as soon as the West Wisconsin Railway Company had finally located its road and filed the map of such location,' whereby the company had lost lands along said line, it shall be entitled to take indemnity therefor 'from the vacant odd-numbered sections from the southeastern part or portion of the indemnity limits of the former grant for the branch roads from said city of Hudson to Lake Superior.' Now, here is a clear recognition and approval of the new location of the road from Tomah to Hudson by the West Wisconsin under the act of 1864, Congress providing indemnity for losses under the new location to be taken within the withdrawn limits of 'the former grant.'

"It being thus apparent that the second location of the road had the sanction of Congress, it follows as a matter of course that the former location was revoked in contemplation of law, and that all claim thereunder and the grant which authorized it was abandoned

by the West Wisconsin Company and thereafter ceased to exist, and the only rights that company can now have in the premises must be held to have been derived from the act of 1864 alone and the new location thereunder. Rights under this act cannot conflict with those derived by the Omaha Company under the grant of 1856, the location of 1858 followed as it was by construction
67 of its road. So that in adjusting this portion of the grant you have erred in making this deduction, and you will follow the rule here laid down as to the conflicting limits of the Wisconsin Central road with that of the Omaha Company in the further adjustment which you are directed to make.

"This suggests the inquiry as to what is the terminus of the Omaha Company on the St. Croix river. That company insists that under its map of 1858 its route was definitely fixed so as to go to both Hud-on and Prescott—points fifteen to twenty miles apart on the river—whilst you, by the map transmitted, fix the terminus at the city of Hudson.

"Neither the act of 1856 nor that of 1864 fixed the exact point on the river to which the road should be built. That of 1856 said 'to the St. Croix river, * * * between townships twenty-five and thirty-one;' that of 1864 said 'from a point on the St. Croix river, * * * between townships twenty-five and thirty-one, to the west end of Lake Superior,' etc. It is apparent from this that some one point was intended within said limits and not several. The company says it is true its map carried the line to two points, but that Prescott, the furthest point, is its proper terminus. In this view I do not concur. In the first place, the company itself, by its own act, has shown that it considers Hudson the proper terminus on the river, inasmuch as after this long lapse of years it has not constructed the road to Prescott, the other point. It is true it has constructed seven or eight miles of road beyond Hudson to River Falls, but that is in a direction away from Prescott rather than towards it, and by no means indicative of a purpose to build a road to the latter place. Besides, having constructed the road to Hudson, a point on the St. Croix river, it is not competent for it to obtain land under its grant to any point further below on said river. This view is sustained by the ruling of this department in the matter of the Atlantic & Pacific Railroad Company (4 L. D., 458). That company was authorized to build a road from the Missouri river to the Colorado river; 'thence by the most practicable and eligible route to the Pacific.' It filed a map of definite location, carrying the road to San Buenaventura, on the Pacific ocean, and at the same time a similar map carrying it thence to San Francisco, three hundred and eighty miles further north on the Pacific. Withdrawals were made under these maps.

"But this department held that while the act authorized the company to select its route to the Pacific, yet when the
68 Pacific was reached at San Buenaventura the terminus was found and it was out of the power of the Land Department, by accepting the map of definite location beyond that point, to extend the road further than the terminus fixed by law and thereby

increased the grant of lands. Hence the withdrawal made beyond San Buenaventura was revoked as having been made without authority and the lands therein ordered to be restored to the public domain. I think the two cases are alike and should be dealt with in the same way.

"A further reason is that Congress itself has given a legislative interpretation to the grant which fixes the city of Hudson as the southern terminus of the road of the Omaha Company in Wisconsin. In the act of March 3, 1873, before quoted, it will be noted that Congress gave to the West Wisconsin Company the right to take indemnity for certain losses within the limits of the former grant for the branch roads 'from the said city of Hudson to Lake Superior.' Here Congress plainly and unequivocally recognizes Hudson as the southern and Lake Superior as the northern terminus of the grant. As I do not think the question admits of a doubt, I approve of the location of the southern terminus at Hudson, as fixed by you.

"It is observed that in the map transmitted and by which you have made the present adjustment of the grant to the Omaha Company you have changed the northern terminal lines of said road at Lake Superior. By the map of definite location filed in 1858 this terminal line was a due east and west course; by the new map the terminal line runs nearly a southwest and northeast course. The effect of this change, counsel for the company states, is to throw outside of the limits of the road 4,873.79 acres of land on the west side of the road and include as much of the waters of Lake Superior on the northeast. It is also stated that the lands now thrown outside by this change were nearly, if not all, certified to the State many years ago.

"You do not specially refer to this change of the terminal limits in your letter, but you state therein that the map and the adjustment were made in accordance with the principles announced in the departmental decision in the matter of The Northern Pacific Terminal Limits (5 L. D., 459) and in the case of Leander Scott *v.* Kansas Pacific Railway Company, *id.*, 468.

"I think you have misapprehended both of those decisions if they have led you to the adoption of the terminal line of
69 your map. In the case of the Northern Pacific the acting commissioner had directed that the general course of the whole length of the line of the road from Spokane Falls to Wallula Junction, a distance of one hundred and ninety miles, should be adopted and a line drawn at right angles therewith for the terminal line at that point. The decision held this to be error and approved of the revocation of the action of the acting commissioner, and the opinion was expressed that the general course of the last twenty-five miles should have been taken and a line drawn at right angles thereto.

"It should be observed, however, that here the department was not passing upon the adjustment of 'terminal' lines in the sense that they are applicable to the end or extremity of the road. Wallula Junction was not the end of the Northern Pacific road; it was a

point to which the road had been constructed on the way of Puget Sound, the terminus or extreme end to which its charter authorized it to go; and this department held, in adjusting the terminal line at the point to which the road was constructed, the rule of adjustment for the purpose of issuing patents during the construction of the road, prescribed by the fourth section of the granting act, should be followed and the terminal lines at the end of construction 'should be run at right angles to the general course of the last twenty-five miles of the road.' This was exactly in harmony with the provisions of the statute.

"In the Scott case the principles upon which railroad grants should be adjusted were most carefully considered, and, though the question on which that case came before the department related more particularly to the lateral limits of the road, the principles therein declared are such that they should settle all questions as to the adjustment of both lateral and terminal limits in the sense that the last expression is applicable to the end of a road. It makes the actual road, as located and made, the object and measure of the grant and the base of its locality, and says that none other must be adopted. With the road thus clearly fixed, lines drawn 'perpendicular to it at each end,' as was said in United States *v.* Burlington Railroad Company, 98 U. S., 340, will determine the final limits without mistake or difficulty. This course you have not followed, but have improperly fixed the said lines in accordance with the general direction of the last twenty miles of the road, and in doing this you have changed the limits as adopted and fixed by
70 the map of definite location thirty years ago. This should not be, and you will therefore readjust the grant in accordance with the former terminal lines.

"The next item to which objection is made is the deduction of 23,015.38 acres because of lands approved to the Wisconsin Farm Mortgage Company under the act of 1856. You say this deduction is made because the act of 1864 expressly prohibits the selection of lands in lieu of lands received under the provisions of the act of 1856. The provision of the act of 1864 referred to is that no 'selection or location be made in lieu of lands received under the said grant of June 3, 1856, but such selection or location may be made * * * to supply any deficiency under said grant of June 3, 1856, should any such deficiency exist.'

"The history of the Wisconsin Farm Mortgage Company and of its claim is found in 5 L. D., 81, where its right to the lands here referred to was passed upon. That case shows that sixty-one miles of the road between Portage and Tomah were constructed under the act of 1856 and prior to the passage of the act of 1864; that the mortgage company became entitled to the portion of the land grant thus earned, and that, there not being sufficient land in either granted or indemnity limits opposite the constructed piece of road to satisfy its claim, it was allowed to select from the indemnity limits north of the St. Croix river.

"It seems to me that the Omaha Company has not sought to make selections in lieu of lands which passed to the mortgage com-

pany or the State under the grant of 1856, but has only made selections for lands which it had earned and was not able to find in place. That in thus seeking to satisfy its grant in the mode pointed out by law the Omaha Company should have its indemnity selections cut down, because the State theretofore made other indemnity selections under the same grant for the mortgage company in the same indemnity limits and for another portion of the road, is an entire misapprehension and a perversion of the proviso referred to. I therefore reverse your action on this point.

"You have also deducted from the amount claimed by the Omaha Company 3,398.57 acres on account of lands erroneously approved to the Bayfield branch of said road and the amount of 883.46 on account of lands similarly certified to the West Wisconsin Company.

"I assume the lands included in these two deductions were
71 lands in place wrongly certified as above since the definite location of the road of the Omaha Company. This being so, it is an unfortunate condition of affairs of that company, since there is no law which contemplates the allowance of indemnity for such a wrong. The remedy for the wrong must be obtained through the courts. The certifying, approving, or patenting of lands within the granted lines of one road to another company, being entirely without authority of law, gave no title to the latter company, and such action would be set aside by the courts of the United States. I must therefore approve your action in relation to these two deductions, but I may suggest that, inasmuch as the Omaha Company owns the Bayfield branch, and, I am informed, also the West Wisconsin road, the error may be rectified by a reconveyance to the United States of the lands erroneously certified, when the Omaha Company could obtain its rights.

"The last deduction in your statement is of forty acres on account of land sold by the United States subsequent to definite location of the Omaha road. This is another wrong for which the act does not authorize the allowing of indemnity, and therefore it was your duty to make the deduction. I see no means of righting the wrong except through an appeal to the courts, if by use of the word 'sales' in relation to this item you mean that said tract was sold at private entry; but if you mean it was purchased under the pre-emption law, under the commutation clause of the homestead law, or under the second section of the act of June 15, 1880 (21 Stat., 237), then indemnity could be allowed the company under the provisions of the act of June 22, 1874 (18 Stat., 194).

"I have thus passed upon all the deductions made by you from the claim of the company, and direct that you will at once readjust its grant in accordance with the views herein expressed.

"In so far as the rulings herein are applicable to the Bayfield branch, it is intended you shall follow them in the adjustment thereof, which you will make at the same time as that of the main line."

Also decision of the Secretary of the Interior in regard to the Bayfield branch, Secretary Lamar to Commissioner Sparks, October 7, 1887 (6 L. D., 210–217), as follows:

"I have considered the matter of the adjustment of the Bayfield branch of the Chicago, St. Paul, Minneapolis & Omaha Rail-
72 road Company as disclosed by your letter of September 12, 1887.

"With two exceptions, all the matters contained in said letter have been passed upon by me in the matter of the adjustment of the grant along the main line of said road; and you will follow in the adjustment of the branch line the principles declared and instructions given in my said decision of even date herewith.

"One of the exceptions is referred to in your letter and is stated to be the failure of the company to construct its road upon the line of definite location. You mention one such deviation in towns. 44 and 45 N., range 7 W., of at least three miles; another in towns. 45 and 46 N., range 6 W., of about four miles, and another, commencing in town. 47 N., range 6 W., diverging in a northwesterly direction to Lake Superior, in town. 48 N., range 5 W., thence along the lake shore to Bayfield, in town. 50 N., a distance of fifteen or twenty miles, 'the two lines for the greater portion of the distance being about eight miles' apart; and you say, 'In my opinion these deflections are fatal to the company's claim for lands opposite the portions of the road where the deflections occur.'

"When the line of a land-grant railroad is once definitely located by the filing with and acceptance of its map by the Land Department neither the company, the department, nor both together can change the line of the road as thus located, and it must be constructed in accordance therewith unless Congress authorizes a change. Van Wyck *v.* Knevals, 106 U. S., 366; Central Pacific R. R. Co., 5 L. D., 661. Whilst the law has adopted this rule, every deduction or deviation from the exact line of the map is not to be regarded as a change of route to the extent of being an unfixing of that which had been 'definitely fixed.'

"In the case just referred to in 106 U. S. one of the grounds on which the right of the railroad company to the lands in controversy was sought to be defeated was 'that after filing its map with the Secretary of the Interior it changed for part of the distance the route of the road.' The deflection complained of was from one to three miles for seventy-five miles. In relation to this the court says:

"'As to the alleged deviation of the road constructed from the route laid down in the map, admitting such to be the fact, the defendant is in no position to complain of it. The lands are within the required limits, whether that be measured from one line
73 or the other. A deviation of the route, without the consent of Congress, so as to take the road beyond the granted limits might perhaps raise the question whether the grant was not abandoned; but no such question is presented. The deviation within the limits of the granted lands in no way infringed upon any rights of the defendant.'

"From the foregoing extract it is apparent that the Supreme Court did not regard a deviation in the construction of the road from the line marked on the map as a matter which required the consent of Congress so long as such deviation or deflection did not

'take the road beyond the granted limits.' In the present case the deflection is nowhere over eight miles from the line of location, whilst the granted limits are ten miles on each side thereof.

"The case of Van Wyck *v.* Knevals, *supra*, was decided at the October term, 1882, of the Supreme Court, but prior to that time this department had made substantially the same ruling in certainly three cases.

"The first of these cases arose under the act of May 12, 1864 (13 Stat., 72), making a grant of lands to Iowa for the benefit of the McGregor Western Railroad Company. The road as constructed deviated from one to five miles from the line of definite location, but did not go outside the granted limits. The matter was referred by this department to the Attorney General, who on February 2, 1880, gave his opinion (16 Ops. Att'y Gen., 457), in which he held, substantially, that in order to entitle the State to the benefit of the lands granted it is necessary that the road should be constructed according to the line of definite location. If a different line be constructed than that definitely located, the State would not be entitled under its grant; but whether the road as constructed is or is not the road as definitely located, it was held, is a question for the Interior Department to determine, and was one largely within the discretion of the Secretary. On this point the opinion continues:

"'Some deflections must in many cases be expected from the line of the road as definitely located, but it is for the department to determine whether or not these make of it a different road or whether there is substantial compliance with the line of definite location. In the exercise of this discretion it is impossible to lay down any legal rules which could govern all cases. * * * I would suggest that if the deflections be in their character immaterial—if they were made for the purpose of avoiding engineering obstacles which could not otherwise be avoided without ex-
74 aggerated expense or to remedy defects in the original location—that such deflections would not destroy the identity of the road constructed with the road of definite location.'

"In adjusting the grant he held that it must be done in accordance with the line of definite location and not that of construction.

"Concurring in the views of the Attorney General, Secretary Schurz investigated the facts in connection with said deflections and found that the line of definite location had been hastily surveyed in mid-winter upon the imperative demand of the land office for the immediate filing of a map; that in the haste and with the ground covered by snow it was impossible to select the best route; that a deflection was made in order to find a better crossing of the fork of the Des Moines river; that another deflection was to avoid a high hill, at another point to avoid a long elevated range, and at another to correct a mistake in the original survey; that the line adopted was the most practicable and the most beneficial to the community, whilst the located road would be attended with undue expense both in construction and operation. Finding these facts, the Secretary was of opinion, April 9, 1880, 'that the identity of the road is not destroyed by the deviations in construction from the

original line, and that the State is entitled to have patents for the granted lands. (Land Office Report, 1880, 122.)

"On April 17, 1880, but a few days after the decision just cited, Secretary Schurz made a similar ruling in the case of the Hastings & Dakota railroad (*ibid.*, 123). The deviations were in some places three to four miles and in others six to seven, and the constructed line for some distance ran north of the Minnesota river, whilst the line of location followed the southern bank. The facts showed that the located line crossed a very rough country of deep gorges and ravines, ran along bottoms where trestle-work and bridging were necessary, crossed the river where an expensive bridge would be required, and also other bridges and embankments, which were liable to be washed out by overflows, all of which would entail upon the company an enormous expense both in constructing and operating the road. On these facts it was held that 'the deviations in question cannot justly be objected to or held to destroy the identity of the road,' and the lands were directed to be certified in satisfaction of the grant.

75 "On June 10, 1880, a similar ruling was made in the case of the St. Paul, Minneapolis & Manitoba Railway Company, St. Vincent's extension (*ibid.*, 124). The location was made for several townships through marshes and swamps which at the time of the survey were dry and through which the engineers then thought a road was entirely feasible. Afterwards it was found that these swamps for a greater portion of the year were usually several feet under water, and that earth to make the necessary embankments through them must be hauled a long distance. A deflection was made for a distance of nearly eighty miles, which was at points as wide as the graded limits, and the trouble was avoided. The Secretary held that the road as constructed was the one 'contemplated by the grant and withdrawals," and that the deflections became necessary in order to avoid engineering obstacles which could not be otherwise overcome without exaggerated expense, or to remedy defects in the original location,' and the State was awarded patents for the granted land.

"The facts in the case now being considered are in many respects similar to those in the recited cases.

"It appears from papers on file that on May 29, 1856, after the passage of the act of June 3, 1856, under which the company claims its first grant, but before its approval by the President, the lands along the supposed route of the road were withdrawn from sale and settlement by telegram from the land authorities, which withdrawal was subsequently continued by letter of June 12, 1856; that subsequently, on March 2, 1858, the St. Croix & Lake Superior Railroad Company, on which the State of Wisconsin had conferred that portion of the grant between the St. Croix river and Lake Superior, presented to the General Land Office a map of definite location of the road from Hudson, on the St. Croix river, to the west end of Lake Superior, and for the branch line as far north as the north boundary of town. 44 N., range 7 W. This map was not accepted, the Commissioner being of opinion that the granting act

provided for a road from the St. Croix river to the west end of Lake Superior and thence to Bayfield.

"My predeces-or, Secretary Thompson, held otherwise, and thought a branch to Bayfield, south of Lake Superior, was authorized, but he was of the opinion that the point of divergence indicated for the branch line was too far south. Application was made March 27, 1858, to the Commissioner to accept the map as showing the
76 route as far as located, and that until the survey to Bayfield could be completed by the company there be an extension of the time along that line set in the public notice for restoration of lands to sale and settlement. It was promised the map of the completed route should be forwarded in one hundred and twenty days. On April 1, 1858, the governor of Wisconsin was informed that the map presented could not be accepted as the location of either main or branch line, because the location of the latter was not complete—'a partial location cannot be considered.' No reply was made to the application for extension of time. Under these circumstances the company felt itself compelled to make haste in its efforts to have its maps on file prior to the time fixed for the restoration of the lands to sale and settlement. The maps were filed June 17, 1858, accepted by the land office, and withdrawals thereunder made, the point of divergence for the branch line being fixed some twelve miles further north than the first map.

"In the course of time the land grant passed to the North Wisconsin Railroad Company, and finally to the present owners of the road, the Chicago, St. Paul, Minneapolis & Omaha Company.

"When construction upon the branch line was about to commence it was found by a more careful examination that the line as located on the map was, if not impracticable, so beset by engineering difficulties, requiring such a vast outlay of money, both in the construction of the road and its subsequent management, as to render it almost unprofitable to the company and greatly to impair its usefulness to the country it was designed to benefit. Under these circumstances, application was made to the Secretary of the Interior for permission to change the route of said branch line further to the eastward; but Secretary Kirkwood stated that he was not clothed with authority to allow the change of the line of definite location of the road in advance, but that if when the road was constructed it was found that engineering difficulties had caused a mere deflection from the located line, such action, if within proper bounds and for proper reasons, would be approved, as had been done in similar cases, if the road constructed was found to be built in substantial compliance with the granting act and its identity had not been destroyed by the deflections. The road thereafter was fully completed and for some years past has been in regular occupation.

"Without going at length into the details of the whole
77 showing made by the papers on file in the case, it is sufficient to refer to some of them. It appears that the survey made prior to the filing of the map of definite location from Bayfield south to town. 44, about fifty miles, was made within twelve days, and it is within these fifty miles the engineering difficulties are encoun-

tered. Profile and topographical maps show that the line was located along a series of ridges covering the country between town. 44 N. and Bayfield, which are five hundred feet above the level of Lake Superior.

"Estimates of the engineering officers of the company show that to build on the located route would require a grade of at least eighty feet to the mile; that much excavation and bridging would be required, costing over one million and a half dollars; also a tunnel costing over two million and a half dollars, and that the estimated difference in the two routes would be over four and a half millions of dollars. Besides this, the grade of eighty feet to the mile, nearly double that of the constructed route, would almost double the operating expenses of the road, and be not only burdensome to it but to the community for whose benefit it is intended.

"Under these circumstances, which are made to appear satisfactorily to me, I am of opinion that the company is entitled to the lands conferred by the grant.

"In your adjustment of the branch line you deduct 9,296.92 acres because of that amount of the Lac Court Oreille Indian reservation found to be within the granted limits under the act of May 5, 1864 (13 Stat., 66), which Indian reservation you hold was excluded from said grant and no indemnity should be allowed therefor.

"There was no Indian reservation along the main line of said road, and nothing was said specially in regard to such reservation in the opinion adjusting the grant for that line, and this subject of the Indian reservation therefore constitutes the second exception referred to on the first page hereof.

"Whilst it is true Indian lands were not mentioned *eo nomine* in the other decision, what was there said in relation to 'reserved' lands will apply with equal force to lands within an Indian reservation, for the fact that such reservation has been made does not place the lands therein in a different category from lands otherwise reserved, disposed of, or appropriated, so far as the operation of the grant upon them is concerned.

78 "The Leavenworth, Lawrence & Galveston case (92 U. S., 747) is specific in relation to this point, which was properly before it, the very question at issue being whether land in an Indian reservation passed under that grant. The language used in the opinion of the court is:

"'Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or other purposes. There is an equal obligation resting on the Government to require that neither class of reservation be diverted from the uses to which it was assigned.'

"This being so, there ought to be no necessity for further discussion of the subject; but if there should be a doubt, a careful and candid examination of the granting act of 1864 ought to remove it. The grant is for 'every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road.' And it further provided: 'But in case it shall appear that the

United States have, when the line of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections or parts of sections granted as aforesaid,' then the company may select as much land 'as shall be equal to such lands as the United States have sold or otherwise appropriated,' etc.

"Now, there seems to be no room for doubt as to the meaning of this first section, which says if at the time of the definite location it shall appear that the United States have 'reserved' any sections, then lands are to be selected in lieu of the lands thus 'appropriated.' This is plain. It puts no limitation whatever upon the declaration; it does not say that Indian reservations are not to be regarded as lands 'reserved' by the United States, or that indemnity shall not be granted for lands lost because of Indian reservations. It simply says that for all lands 'reserved' to the United States there shall be indemnity. I do not see that the plain purpose and meaning of this section of the act can be made more clear than its own language makes it.

"I hold it, then, as beyond question that, under this first section standing alone, the company is entitled to select indemnity lands for such within the granted limits as are found at the date of definite location to be 'reserved,' and that the Indian lands in question were in that category. Is there anything in the other provisions of the act to change or qualify this declaration?

79 "It is asserted that the sixth section does materially change the provisions of the first and precludes the allowance of indemnity for lands within the Indian reservation. That section is copied, and reads as follows:

"'That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner or for any purpose whatsoever, and all mineral lands, be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands.'

"The first section grants the odd-numbered sections of land in place along the road within certain limits. The sixth section says, But if any of said sections are 'reserved,' they are not granted. The sixth section is therefore a limitation upon the grant, a proviso that 'reserved' lands shall not be taken. Being a proviso, it must be strictly construed.

"In the case of United States *v.* Dickson, 15 Peters, 141, the Supreme Court, through Mr. Justice Story, says it is—

"'The general rule of law which has always prevailed, and became consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.'

"Applying this rule to the sixth section, we find that it plainly declares that lands reserved 'for any purpose whatsoever' are ex-

cluded from the operation of the grant, and this is all; not one word about indemnity, so that subject is certainly not within the 'words' of the act.

"In addition to what has been said in the Barney case (113 U.S.) about this proviso, or rather one exactly similar in the act then being considered, the Supreme Court, in the Leavenworth, Lawrence & Galveston case, *supra*, also had under consideration, as said before, a section containing the same language.

"In that case lands which were in an Indian reservation at the date of the grant, but which had subsequently been released therefrom, were taken as indemnity lands by the railroad company, and suit was brought by the United States to declare title to be in
80 the Government. The court sustained the claim of the Government, and in so doing declared that the proviso was not necessary to reserve Indian lands from the operation of the grant, because, such lands having been previously appropriated or reserved, subsequent laws did not affect them. Said the court:

"'That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government and saved from a possible grant is a proposition which will command universal assent. What ought to be done has been done. The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted.'

"According to the view of the court the proviso introduced no new matter or element into the granting act nor took anything out that was there before; it simply emphasized, strengthened, and made more plain that which went before.

"Now, if the act itself did all the proviso does—if, in other words, there was no necessity for the proviso—it must be apparent there is nothing in it which was intended to conflict with or alter the granting clause, and the two must be read together in harmony and not in discord. If indemnity is not to be granted for lands within an Indian reservation, then we must hold that the proviso does not conflict with and repeal *pro tanto* the first section when its says indemnity is to be allowed if it appears that any of said land has been 'reserved,' and hold that the proviso carves all Indian reservations out of the indemnity provisions. On the other hand, if we read the proviso in harmony with the rest of the act, as we are bound to do by every canon of construction, by the authority of the Barney case, and that of the last cited, and, it may be added, by what seems to me to be its very plain text, we must hold the proviso simply to mean that 'reserved' lands cannot to taken either for granted or indemnity purposes or their status in any way interfered with by anything in the granting act; and, further, that the proviso in no way conflicts with the first section allowing indemnity for all 'reserved' lands.

"Concurring in this harmonious reading of the whole act, I reverse your action disallowing indemnity for lands within the Indian reservation, and direct such indemnity to be allowed; and, further, that the grant along the branch line be readjusted

81 in accordance with the views herein expressed and those in the decision as to the main line."

Also decision of the Secretary of the Interior on the appeal of the Wisconsin Central Railroad Company, Secretary Noble to the Commissioner of the General Land Office, January 24, 1890 (10 L. D., 63–77), as follows:

"This is an appeal by the Wisconsin Central Railroad Company from your office decision of October 15, 1888, holding for cancellation certain lists (inappropriately styled 'selections' in your said office decision) made by said company July 2, 1887, of lands claimed as a part of its grant under the act of May 5, 1864 (13 Stat., 66), to the extent that they included the following-described tracts, situated in the Ashland district, in the State of Wisconsin: (List omitted.)

"These lands are within the ten-miles or primary limit*n* of the grant of May 5, 1864, now owned by the said Wisconsin Central Company, and are also within the fifteen-miles or indemnity limits of the grant (Bayfield branch) under the act of June 3, 1856 (11 Stat. 20), now owned by the Chicago, St. Paul, Minneapolis & Omaha Railway Company.

"The matters involved in the appeal make it necessary to refer at some length to the provisions of these two acts of Congress and the subsequent proceedings thereunder.

"By the first section of the act of June 3, 1856, there was 'granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus by the way of Portage City to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the State line, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads respectively.' 'But,' the act declares, 'in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States

82 nearest to the tier of sections above specified so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the right of pre-emption has attached as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purposes aforesaid: Provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case and selected for and on account of said roads;' and there was added the further proviso 'that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner

for any purpose whatsoever' should be reserved to the United States and excepted from the operation of the act except so far as necessary for the location of the routes of the said railroads, in which case the right of way only was granted.

"The fourth section of the act, after prescribing the manner in which the lands thereby granted were to be sold by the State, to the end that the purpose of Congress relative to the construction of said roads might be accomplished, further provided that 'if said roads are not completed in ten years no further sales will be made and the land unsold shall revert to the United States.'

"This grant was formally accepted by the State of Wisconsin on October 8, 1856, upon the terms and conditions contained in the act assumed, and the State undertook the trust thereby granted.

"On October 11, 1856, the State, by an act of its legislature, authorized the La Crosse & Milwaukee Railroad Company to construct and operate the roads described in the act of Congress, from Madison or Columbus via Portage City to St. Croix river or lake, and thence to the west end of Lake Superior and to Bayfield, and granted to that company, for the purpose of aiding such construction and upon certain terms and conditions not necessary to be here set forth, all its interest and estate, present and prospective, in the lands granted by said act of Congress for the benefit of the roads between the points and along the routes named.

83 "The La Crosse & Milwaukee Company promptly accepted the grant thus conferred by the State upon the terms, conditions, etc., therein contained.

"On October 22, 1856, the Commissioner of the General Land Office issued an order addressed to the registers and receivers of the land offices at Superior City, Hudson, and Eau Claire respectively, in the State of Wisconsin, in which he instructed them, among other things, as follows:

"Upon the filing in your offices of the duly certified map of the line of route as 'definitely fixed' of any of the roads referred to in the act entitled 'An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State,' approved June 3, 1856, you will, without awaiting further instructions from this office, cease to permit locations or entries by pre-emption or for any purpose whatever of the lands within fifteen miles of said route.

"In March, 1857, the La Crosse & Milwaukee Company, with the consent and approval of the State, obtained through another act of its legislature, transferred and conveyed to the St. Croix & Lake Superior Railroad Company all its rights and privileges relative to the construction of that portion of the road running northward from a point of intersection with the St. Croix river or lake to the west end of Lake Superior and to Bayfield and in regard to the use and disposal of that portion of the congressional grant applicable to such construction which had been conferred upon the grantor company by the State under the act of its legislature of October 11, 1856. By the same instrument the St. Croix & Lake Superior Company agreed on its part to construct the designated roads north from St.

Croix river or lake to the west end of Lake Superior and to Bayfield within ten years from June 3, 1856, the date of the congressional grant.

"The map of definite location of that part of the main line of road from Madison via Portage City to the St. Croix river or lake was filed by the La Crosse & Milwaukee Company September 7, 1857; the map of definite location of the main line north from St. Croix river or lake to the west end of Lake Superior was filed by the St. Croix & Lake Superior Company March 2, 1858, and the map of definite location of the Bayfield branch was filed by the same company July 17, 1858. These several maps of location were filed under the provisions of the act of June 3, 1856.

"That part of the main line running from Portage to Tomah,
84 a distance of about sixty-one miles, was constructed by the La Crosse & Milwaukee Company in the spring of 1858 and has been used since April of that year for freight and passenger purposes.

"It further appears that on March 1, 1859, the Commissioner of the General Land Office transmitted to the registers and receivers of the several land offices hereinbefore mentioned 'for their information in the matter * * * a diagram of the districts of land subject to sale' at their respective offices upon which had been designated 'the lines of route, the lines of the six and fifteen miles limits, of the "St. Croix and Lake Superior" and the Bayfield line of railroads, to aid in the construction of which a grant was made to the State of Wisconsin by an act of June 3, 1856,' and instructed them that 'as all the vacant tracts in the odd-numbered sections outside of the six and within the fifteen miles limits of the roads have been selected by the agent of the State in lieu of the lands sold and preempted in the alternate sections granted by the above-mentioned act, such tracts you will, of course, continue to reserve as heretofore from sale or location for any purpose whatever.'

"This 'selection' by the agent of the State was not a selection of specific tracts in lieu of ascertained losses in the granted limits of the road, but appears to have been simply the exercise of a supposed option to take indemnity under the act of June 3, 1856, either from the odd or even numbered sections, inasmuch as that act did not specify which should be taken, and it was in view of this designation by the State of the odd numbered sections outside of the six and within the fifteen miles limits of the grant as the source from which its indemnity for losses in the six-miles limits should be supplied (and not their selection for losses already sustained) that the Commissioner ordered the local officers to 'continue to reserve' such odd-numbered sections 'from sale or location for any purpose whatever.' The designation was, in fact, made before the several maps of definite location of the roads were filed and was apparently done merely as a matter of information to the Commissioner of the General Land Office in order that he might know, when such maps of definite location should be filed, what lands to withdraw from sale or location for the purpose of securing to the State the indemnity privileges granted by the act of Congress.

"It also appears that after the main and branch lines of road were definitely located a large amount of indemnity lands
85 was selected and certified to the State under the act of June 3, 1856, but no part of the main line except the sixty-one miles aforesaid from Portage to Tomah nor of the branch line to Bayfield was constructed until after the passage of the act of May 5, 1864, *supra*, the provisions of which we come now to notice.

"By the first section of that act there was granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior and from some point on the line of said railroad to be selected by said State to Bayfield every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six.

"The second section provided for the construction of a railroad from Tomah to the St. Croix river or lake, between townships twenty-five and thirty-one, making a like grant to the State for that purpose of every alternate odd-numbered section of public land for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State for the same purpose by the act of June 3, 1856, upon the same terms and conditions as are contained in that act.

"The two sections are almost identical in the language used and make the same grant in aid of each road. The indemnity limits were increased from fifteen to twenty miles in each case, and the indemnity selections were to be made by the State in the same manner and upon like conditions as were prescribed in the act of June 3, 1856. It was also provided that no selection or location should be made in lieu of lands received under the grant of June 3, 1856, but that such selection and location could be made for the benefit of the State and for the purposes stated to supply any deficiency under said grant of 1856 should any such deficiency exist.

"By section three of the act there was granted to the State for the purposes of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may
86 determine, in a northwestern direction to Bayfield and thence to Superior, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June third, eighteen hundred and fifty six.

"It will be observed that this section provided for the construction of an entirely new and distinct railroad, different from any of the roads mentioned in the act of 1856. Provision was made for

indemnity selections within twenty miles of the line of the road upon conditions similar to those prescribed in sections one and two of the act, except that no reference was made to deductions of lands granted by or received under the act of 1856, there having been no grant as to this road by that act.

"By section five the time limited for the completion of the roads under the act of June 3, 1856, was extended to a period of five years from and after the day of the passage of this act.

"By section six it was further enacted that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner for any purpose whatsoever and all mineral lands be, and the same are hereby, reserved and excluded from the operation of this act, except so far as it may be necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"The ninth and last section provided that if the road mentioned in the third section was not completed within ten years from the passage of the act no further patents should issue or sales be made of the lands granted in aid thereof, and that such lands at that date unsold should revert to the United States.

"On March 29, 1865, the State formally accepted the grant of 1864, and the benefits of the same were subsequently conferred upon three different railroad companies, as follows: The St. Croix & Lake Superior Company as to the road mentioned in the first section thereof, the Tomah & St. Croix Company as to the road mentioned in the second section, and the Portage, Winnebago & Superior Company as to the road mentioned in the third section.

87 "The act of the State legislature conferring the grant as to the road described in said third section upon the Portage, Winnebago & Lake Superior Company required that company to construct the line of said road upon and along a route running from Portage, by the way of Ripon, in the county of Fond du Lac, and Berlin, in the county of Green Lake, to Stevens' Point, and thence to Bayfield and thence Superior, on Lake Superior. Congress, by act of June 21, 1866 (14 Stat., 360), gave its assent to this requirement of the State as to the location of the route of said road, and consented also to the application of the lands granted by said third section to the construction thereof. The road was definitely located by said Portage, etc., Company on the line of route thus prescribed November 10, 1869. By act of March 3 (18 Stat., 511), Congress gave its further consent to a change in the route of said road between Portage and Stevens' Point, so as to shorten the same. As thus shortened the road was finally constructed from Portage direct to Stevens' Point, and from thence to Ashland, on Lake Superior, and it is now owned, together with all benefits accruing under the third section of said grant of 1864, by the Wisconsin Central Railroad Company, the appellant here, which will, for convenience, hereinafter be referred to as the Central Company.

"The St. Croix & Lake Superior Company filed no map of defi-

nite location under the act of 1854, but on April 22, 1865, the board of directors of that company accepted and adopted the old line as located under the act of 1856 as the definite location of its route under the act of 1864, both as to the main line from St. Croix river or lake to Superior, on Lake Superior, and as to the Bayfield branch. These roads have been constructed and are now owned and operated by the Chicago, St. Paul, Minneapolis & Omaha Railway Company, hereinafter referred to as the Omaha Company.

"The Bayfield branch of the Omaha road, as it approaches Lake Superior in its northeasterly course, approaches in a lateral direction the line of the Central Company's road as it proceeds in a northwesterly course to Ashland, on Lake Superior, so that there is an intersection or overlapping of the primary and indemnity limits of the Central Company's road with the primary and indemnity limits of said Bayfield branch of the Omaha road, both under the act of 1856 and under the act of 1864.

88 "The lands here in question are within the ten miles granted limits of the Central Company's road, and also within that part of the fifteen miles indemnity limits, under the act of 1856, of the Bayfield branch of the Omaha road, which lies outside of the enlarged limits (from six to ten miles) of that branch under the act of 1864. They were listed by the Central Company, as we have seen, on July 2, 1887, as having inured to it as a part of its grant under the act of 1864.

"These lists were held for cancellation by your office upon the stated ground that the lands covered thereby, having been withdrawn for indemnity purposes under the act of 1856, prior to the passage of the act of 1864, were reserved for all purposes from the grant under the latter act to the Wisconsin Central Railroad Company; and the case of the Omaha Company, decided by this department October 1, 1887 (6 L. D., 195), is cited as authority for such action.

"In that case, wherein the Wisconsin Central Company was not a party to the record and was not heard upon the questions decided, it was held by my predecessor, Secretary Lamar, that the lands within the fifteen-miles limits of the withdrawal under the act of 1856 were reserved from the grant under the act of 1864 in favor of the Wisconsin Central Company, and that the Omaha Company is entitled to the whole of the designated sections within the six-miles limits, and to be indemnified for losses therein out of the designated sections within the fifteen-miles limits, to the exclusion of the other company, as fully as though the grant to it had never been made.

"The alleged grounds of this appeal, substantially stated, are:

"First. That the act of May 5, 1864, operated as a repeal of the act of June 3, 1856, except as to rights actually vested thereunder when the act of 1864 was passed, and that, in view of such repeal, the respective rights of the Omaha & Central companies date from and exist only under and by virtue of the act of 1864.

"Second. That when the line of the Central Company's road was definitely located in November, 1869, the lands here in question,

though having been previously withdrawn and reserved for indemnity purposes of the Bayfield branch of the Omaha road, under the act of 1856, were not for that reason in such a state of reservation as served to except and exclude them from the operation of the grant under the third section of the act of 1864.

89 "It is proper here to state that on February 12, 1884, an agreement was made by the Omaha and Central companies, a copy of which is on file in this record, by which an amicable adjustment was made of all controversy existing between the said companies relative to the lands in the overlapping limits of the several grants under the act of 1856 and 1864. By the twelfth section of that agreement it is stipulated that the Central Company shall have all the lands in the overlap lying east of the easterly ten-miles limit of the Bayfield branch of the Omaha road and northeast of the westerly ten-miles limit of the Central Company's road. The lands in question are covered by said twelfth section, and there is therefore no controversy between these companies relative to the same. The controversy here is solely between the United States and the Central Company.

"The case has been argued with great earnestness by counsel for the company, both orally and by printed brief, and I have sought to give it that careful consideration which is due to the importance of the questions presented.

"It is reasonably clear, I think, that by the act of June 3, 1856, Congress intended to provide for the construction of one continuous line of railroad from Madison or Columbus, via Portage City and the St. Croix river or lake, to the west end of Lake Superior and to Bayfield; or, at any rate, that the construction of such continuous line of road by one company was rendered possible by that act. It is also clear to my mind that the act of 1864 was intended to destroy and did destroy the continuity of the line provided for or made possible by the act of 1856.

"It should be stated in this connection that prior to the passage of the act of 1864 the grant under the act of 1856, either by express grant from or with the approval of the State, had been allotted to and the rights thereunder became vested in several different companies (over three in number) for the construction of as many separate and distinct portions of the line of road therein described.

"Instead, therefore, of making an enlarged or additional grant for the one entire and continuous line described in the act of 1856, the act of 1864, apparently recognizing and approving the scheme theretofore adopted by the State, destroyed the continuity of the grant under the former act and divided the whole line into three distinct parts, making enlarged grants of land, with increased indemnity limits, in aid of each and of the two unconstructed

90 parts, namely, from Tomah to the St. Croix river or lake, and from that point to Lake Superior and to Bayfield, but not legislating as to the third part, from Madison to Tomah, the greater portion of which, we have seen, had already been constructed.

"There are no express words of repeal used in the act of 1864, nor

is there, in my judgment, such positive repugnancy between the essential provisions of the two acts that they cannot stand together. It is a well-settled principle of the law that repeals by implication are not favored and are never allowed, except in cases where inconsistency and repugnancy are plain and unavoidable. Potter's Dwarris on Statutes, 156; McCool *v.* Smith, 1 Black (U. S.), 470. Ordinarily express language is used when a repeal is intended, and in the absence of such express repeal none will be declared unless the two acts are irreconcilably inconsistent, and then only to the extent of such irreconcilable conflict. The implication of repeal must be a necessary one, and when two acts can be reconciled by a fair and reasonable construction it must be done. 'If statutes on the same subject can stand together without destroying the evident intent and meaning of the later one there will be no repeal.' Sedgwick on Statutory Construction, 98. In McCool *v.* Smith, *supra*, it was said by the Supreme Court that 'a repeal by implication is not favored; the leaning of the courts is against the doctrine if it be possible to reconcile the two acts of the legislature together.' See also case of The Distilled Spirits, 11 Wall., 356.

"Applying to the act of 1864 the principle of construction thus enunciated, I see nothing in the provisions of that act so repugnant to or so irreconcilably inconsistent with the main features of the act of 1856 as to warrant me in holding that the one was intended by Congress to operate as a repeal of the other. On the contrary, the more natural and reasonable conclusion to be drawn from a careful comparison of the two acts is, it seems to me, that Congress intended the grant of 1864 to be auxiliary to and in aid of the general and main purpose of the grant of 1856 as to the roads common to both and, without impairing any rights acquired or vested under the act of 1856, to destroy for the future the continuity of the one line of road rendered possible of construction by that act and to make the coterminous principle, except as to rights already vested, applicable to the unconstructed portions of such line. The act of 1864,
91 if at all repugnant to the act of 1856, is only so to the extent that it abrogates the continuous principle which it was possible to have been applied to the grant under the former act, and substitutes instead thereof the coterminous principle as to the roads yet to be constructed. This, in effect, it may be said, had already been done by the State in conferring in the manner stated the grant of 1856 upon several different companies for the construction of separate and distinct portions of the road therein described, and to that extent only, in my judgment, can it be held that the later act by implication repealed the former.

"But, furthermore, it seems to me that the fifth section of the act of 1864 furnishes a conclusive argument against the theory of repeal by implication. By that section the time fixed and limited in the act of 1856 for the completion of the roads therein mentioned was extended for the period of five years from the date of the act. It will be observed that it was the time fixed and limited in the act of 1856 which was extended by the act of 1864. Now, it cannot be reasonably claimed that if Congress intended the act of 1864 to

operate as a repeal of the act of 1856, and that the rights of the State as to all roads mentioned in the later act should, in common, date from and exist only under that act, it would, in the same breath, have 'extended' the time fixed for the completion of the roads in the very act intended to be repealed. It is hardly probable that Congress would, in a repealing act, undertake to extend the time fixed for the accomplishment of a certain purpose in the act repealed. It is much more reasonable to suppose, in this instance, that if Congress had intended the act of 1864 as a repeal of the act of 1856 a new limitation of time for the completion of the roads, entirely distinct from and independent of that fixed in the act of 1856, would have been prescribed in the repealing act; but, instead of this, Congress extended the time fixed in the act of 1856 for the completion of the roads mentioned in both acts, thus necessarily implying a continuance in force, as to those roads, of the material provisions of the act of 1856; while, as to the road mentioned only in the act of 1864 (now the Wisconsin Central), a new limitation of time is prescribed for its completion, to wit, ten years from the date of that act. See sec. 9, act 1864. The reasonable and, to my mind, almost irresistible conclusion is that Congress did not intend by the act of 1864 to repeal the act of 1856, except probably to the extent hereinbefore indicated, but that by the later act an enlarged
92 grant of lands, with increased indemnity limits, was given to the State for each of the roads common to both acts, and a distinct and independent grant was made to the State, with similar indemnity privileges, for the road not mentioned in the former act; that the rights of the State and its transferees relative to the last-mentioned grant date from and exist only under the act of 1864, while the rights of the State and its transferees relative to the roads common to both acts respectively date from and exist under and by virtue of both acts.

"Reference is made by counsel for the company to what is known as 'the St. Croix land case' (Madison & Portage Railroad Company *v.* The North Wisconsin Railway Company and others, not reported), decided in 1879 in the circuit court of the United States for the western district of Wisconsin, in which Mr. Justice Harlan, sitting with Judges Drummond and Bunn, delivered the opinion of the court. This opinion is referred to and relied upon as having established in that case the principle now contended for. The case was carried to the Supreme Court on appeal, but, the matters in dispute therein having been compromised by the parties, the appeal was not prosecuted to a final hearing.

"I do not, however, understand the decision of the circuit court in that case as holding that the act of 1864 operated as a repeal of that of 1856. True, some of the expressions used by Justice Harlan in delivering the opinion, when considered by themselves, point in that direction; but at the same time other expressions were used in the opinion which point to the opposite conclusion, and it must be borne in mind that the precise question here presented was not involved in that case. The real contention in that case was that notwithstanding the act of 1864 the continuous principle should be

applied to the adjustment of the grant under the act of 1856, as to all lands embraced within the prescribed limits of that grant, in favor as well of those portions of the main line of road constructed after the act of 1864 as of that portion from Portage to Tomah, which was constructed prior to the passage of that act. The court decided against this contention and dismissed the complainant's bill and the cross-bills filed in the case, holding that the purpose of the act of 1864 was to break the continuity of the original main line from Tomah via St. Croix river or lake to the west end of Lake Superior and to Bayfield and devote to the construction of separate and
93 distinct portions of that line an increased quantity of lands beyond the amount granted by or which could have been made available under the act of 1856; and, further, that by its acceptance of the grant of 1864 the State bound itself to an administration of the grant upon the coterminous theory except as to rights acquired or vested by virtue of the act of 1856 and the proceedings subsequently had. The opinion does not, in my judgment, sustain the contention of counsel here, nor do I see anything in it which can be considered as really antagonistic to the views I have herein expressed. These views, moreover, are in harmony with the previous rulings of this department in matters relating to the construction of said acts of 1856 and 1864 (Wisconsin Railroad Farm Mortgage Land Company, 5 L. D., 81; Chicago, St. Paul, Minneapolis & Omaha R'y Co., 6 L. D., 195; case of the same company, 9 L. D., 221; and another case of the same company, 9 L. D., 483), and the conclusion arrived at is fully sustained, in my opinion, by the case of Schulenberg *v.* Harriman, 21 Wall., 44, in which the Supreme Court had under consideration the same two acts of Congress out of which the present controversy has grown and wherein they are spoken of and treated by the court as separate grants, the main provisions of which, respectively, were then (1874) still in force.

"My conclusion, therefore, is that the act of 1856 is not repealed by the act of 1864.

"This brings me to a discussion of the other question presented by the appeal, namely, as to whether the lands in controversy were reserved from the grant of 1864 to the Wisconsin Central road. It has been already shown that these lands were ordered withdrawn from entry or location by the Commissioner of the General Land Office October 22, 1856, and that on March 1, 1859, after the routes of the roads had been definitely fixed under the act of June 3, 1856, a further order was made by the Commissioner directing the local officers to 'continue to reserve' as theretofore 'the vacant tracts in the odd-numbered sections outside of the six-miles and within the fifteen-miles limits of the roads.' These lands are covered by this order of reservation, which was in full force when the act of 1864 was passed and remains to this day unrevoked by executive direction.

"It is earnestly contended by counsel that this was not such a reservation as served to exclude the lands embraced therein from the operation of the act of 1864, and in support of this con-
94 tention it is argued that a withdrawal for indemnity pur-

poses confers no vested right to the land, but only a right of selection which may be defeated by a subsequent grant, and the right thus become 'a mere barren right.'

"It may be fully conceded, so far as this case is concerned, that an executive withdrawal of lands for indemnity purposes constitutes no bar to a subsequent grant by Congress of the same lands. This is not the question here presented. The question is whether Congress did not, by the sixth section of the act of 1864, expressly exclude and intend to exclude the lands now in controversy from the operation of that act. By that section it was enacted 'that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner for any purpose whatsoever' should be 'reserved and excluded' from the operation of the act. Now, while these lands (being within the indemnity limits of the grant of 1856) had not been at the date of the grant of 1864, strictly speaking, reserved by 'act of Congress' for purposes of 'internal improvement,' they had been prior to that date reserved by competent authority to the United States in order that the purposes of the grant of 1856 might in all respects be full-accomplished. They were essentially 'reserved lands' at the date of the grant of 1864. It is not necessary that they should have been reserved by 'act of Congress' or for purposes of 'internal improvement.' The excepting section of the act of 1864 was made so broad and comprehensive as to cover 'all lands reserved' * * * 'in any manner for any purpose whatsoever.' It cannot be questioned that these lands were by competent authority actually 'reserved to the United States' from sale, entry, or location, and that they were so reserved in consequence of the act of 1856 and for the purpose of securing to the State the indemnity privileges granted by that act. They were reserved to the Government to enable it to carry into effect the provisions of the act of 1856 granting certain lands for railroad purposes and the right to select indemnity for lands lost in place, and were therefore, in the full sense of that term, reserved for purposes of 'internal improvement.' Congress, when it made the grant of 1864, was, presumably, perfectly familiar with all the proceedings prior to that date under the act of 1856, and must have known of said reservation for indemnity purposes under that act.

The words used in the sixth section of the act of 1864 point
95 almost directly to the grant of 1856 and the executive reservation thereunder. Certainly more expressive or comprehensive words could not have been used if Congress had been legislating with special reference to such previous grant and reservation.

"I must therefore hold that the lands in question, having been previously reserved in the manner stated for indemnity purposes under the act of 1856, were, by the sixth section of the act of 1864, expressly 'reserved and excluded' from the grant made by the third section of that act; and the principle thus enunciated is not without high authority to sustain it.

"The general doctrine that lands reserved or otherwise disposed

of or appropriated in any manner for any specific purpose by competent authority are not to be considered as included in a subsequent grant by Congress is old and well established. A long line of decisions by the Supreme Court support the doctrine, and it is needless here to refer to such decisions at length. As bearing directly, however, upon the precise question now under consideration, which is novel in respect to the purposes for which the reservation was made, the case of Wolcott *v.* Des Moines Navigation & R. R. Co. (5 Wall., 681) is one in point. The question presented in that case involved the construction of a grant of lands made by Congress to the State of Iowa May 15, 1856 (11 Stat., 9), for the purpose of aiding in the construction of certain railroads therein mentioned, which contained an excepting proviso couched in almost the identical language used in section six of said act of May 5, 1864. Prior to the date of that grant, to wit, on August 8, 1846, Congress had made a grant of certain lands to the Territory of Iowa for the purpose of aiding in the improvement of the Des Moines river 'from its mouth to Raccoon fork.' The grant was of 'one equal moiety, in alternate sections, of the public lands' to be 'selected' within the Territory 'in a strip of five miles in width on each side of said river.' The question arose as to whether the grant embraced lands along the whole length of the river or only up to the point where the Raccoon fork flowed into it. This question gave rise to great dispute and extended discussion, pending which the Land Department ordered a withdrawal from sale of lands above as well as below the Raccoon fork. The question finally came before the Supreme Court in the case of Dubuque & Pacific Railroad Company *v.* Litchfield (23 How., 66), and it was there decided that the grant
96 of 1846 did not extend above the Raccoon fork. One of the roads under the grant of May 15, 1856, to the State of Iowa was located through the lands above Raccoon fork, which were embraced within the withdrawal previously made under the river grant of 1846. The question in the Wolcott case was whether the lands included in said withdrawal above the Raccoon fork passed to the State under the railroad grant as far as embraced within its limits or whether they were excluded from the operation of that grant as 'reserved lands' by reason of the excepting proviso therein. It was admitted that the railroad grant covered the tract there in question unless excluded by this proviso. The court held that notwithstanding the aforesaid withdrawal of the lands had been made under the wrongful supposition that they were embraced in the river grant, yet the withdrawal, having been made by competent authority, constituted such a reservation of the lands as served to exclude them from *from* the railroad grant by reason of the excepting proviso in the act making that grant.

"It is contended by counsel that this case is not an authority on the question here presented, because the withdrawal therein mentioned was not a withdrawal for indemnity purposes; but, in my judgment, this contention is unsound. True, that withdrawal was not made for indemnity purposes, but it was rendered none the more effective for that reason as a reservation of the lands covered

by it. It was a withdrawal of lands which Congress in fact had never contemplated should be withdrawn under the river grant, and was made only for a supposed purpose or by reason of a grant supposed to exist, but which did not exist. In other words, it was a withdrawal improperly made, under a supposed grant which in fact had no existence. The withdrawal here in question was in all respects properly made and was for a specific purpose under a grant not merely supposed to exist, but which did exist. It seems to me, therefore, that the Wolcott case is authority directly in point and must be considered as conclusive of this question. That case was decided in 1866, and the doctrine therein announced has been since repeatedly affirmed by the Supreme Court. Williams *v.* Baker, 17 Wall., 144; Homestead Company *v.* Valley Railroad, *id.*, 153; Wolsey *v.* Chapman, 101 U. S., 755, and numerous
97 other cases. In each of these cases specially cited the Wolcott decision was discussed at some length and the principle therein laid down expressly reiterated.

"Reference is made by counsel to the Kansas Pacific case (112 U. S., 414) and the cases of United States *v.* Southern Pacific Railroad Company and United States *v.* Colton Marble and Lime Company, recently decided in the circuit court of the southern district of California and reported in 39 Fed. Rep., 132, as authority opposed to the views I have herein expressed. I do not so understand these cases. In the Kansas Pacific case there was an order of withdrawal made in March, 1863, nearly three years before any location of the route of the road had been made, of lands lying within ten miles of certain lines marked on a diagram by the Commissioner of the General Land Office as 'the probable lines' of the road and its branches. As a matter of fact, the withdrawal thus made did not cover the lands in controversy, and any reference thereto was unnecessary to the decision in that case. The court, however, spoke of it as having 'affected no rights which without it would have been acquired to the lands' and as in no way controlling the subsequent grant thereof, evidently treating it, because made at the time and in the manner stated, as not amounting to a withdrawal for any purpose, but being a mere nullity, having no effect whatever; and this is in accord with the doctrine announced in Van Wyck *v.* Knevals (106 U. S., 360, 366–7).

"In the cases cited from 39 Federal Reporter the question here presented was not considered or decided by the circuit court. The grants there under consideration were the grants to the Atlantic & Pacific Railroad Company and to the Southern Pacific Railroad Company, made by the same act (July 27, 1866, 14 Stat., 292), and the grant to the latter company made by section twenty-three of the act of March 3, 1871 (16 Stat., 573), which latter act contains the proviso 'that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company.' This was the proviso construed by the court in those cases, and in respect thereto it was held that it did not include unselected lands within the indemnity limits of the grant to the Atlantic & Pacific Company, because that company

had no right, prior to selection, to any particular tract of land in such indemnity limits, and the lands there in question, never having been selected by the Atlantic & Pacific Company, were
98 held not to have been excepted from the grant to the Southern Pacific Company by reason of anything contained in said proviso. That was a very different question from the one arising in this case.

"The further contention of counsel is that if the act of 1864 operated upon the indemnity limits of the grant of 1856 so as to turn four miles of those limits into place limits under the grant of 1864 in favor of the roads common to both acts, it must also in like manner operate in favor of the Wisconsin Central road, which takes its grant only under the third section of the act of 1864, so as to turn the remaining five miles of those indemnity limits embraced within the overlap or intersection of the ten-miles limits of the latter road into place limits under its grant. It is obvious that such a result does not necessarily follow from the premises stated. By the act of 1864, as we have seen, an enlarged grant was made for the roads common to that act and the act of 1856. Whereas the place limits of the grant of 1856 were six miles and the indemnity limits fifteen miles, they were increased by the act of 1864, the place limits to ten miles and the indemnity limits to twenty miles. Congress must necessarily have intended that the grant of 1864 should thus operate; otherwise its object might have been wholly defeated by the adoption of the old line under the act of 1856 as the line of road under the act of 1864. The acceptance of this increased grant of 1864 by the State amounted also to an express consent on its part that the grant should so operate. The State willingly took the four miles additional place limits, making ten miles in all instead of six, and the five miles additional indemnity limits, making twenty miles in all instead of fifteen. In lieu of the four miles of the old indemnity limits thus changed into place limits Congress gave five miles additional indemnity limits. The purpose of the indemnity reservation under the act of 1856 as to those four miles ceased to exist, therefore, upon the acceptance by the State of the grant of 1864, and at the date when the line of road became 'definitely fixed' under that grant there was really no reservation for indemnity purposes in force as to such four miles. This is true of all the roads which derive their rights from both acts, while as to the Wisconsin Central road, which takes its grant only under the third section of the act of 1864, an entirely different state of things exists, presenting a very different question. The rights of this road date from and exist only under and by virtue of the act of 1864 and must be determined by a construction of that act.

99 "Entertaining these views, I must affirm the decision which is the subject of this appeal."

Also decision of the Secretary of the Interior on the final adjustment of the grant of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, Secretary Noble to the Commissioner of the General Land Office, February 11, 1890, as follows (10 L. D., 147–150):

"In the matter of the adjustment of the grants made by the act of June 3, 1856 (11 Stat., 20), and of May 5, 1864 (13 Stat., 66), to the State of Wisconsin, and of which the Chicago, St. Paul, Minneapolis & Omaha Railway Company is the beneficiary, on October 30, 1889, you forwarded for approval lists 13, 14, and 15, being of lands which, in your opinion, should be patented for said company. Accompanying the lists is an explanatory letter, which contains a summary of the adjustment of said grants, stated to have been made 'in accordance with the several decisions of the department.'

"From your letter it appears that there are within the primary limits of the main line of said road 4,839.66 acres of land to which the company is entitled. Of this amount 501.80 acres are described as 'vacant and subject to grant.' This item it is not proposed to issue patents for at this time, though charged to the company in your statement. The reason for this is understood on inquiring at your office to be because the company has not applied for said lands and paid the costs and fees required prior to approval. So that the quantity now stated to be ready for approval within the granted limits of the main line amounts to 4,337.86 acres, and within the same limits of the branch line to 3,443.63, aggregating 7,781.49 acres, and for the purpose of conveying title to these lands you send for my approval list 13; but this list is for 7,603.37 acres only, or 178.12 acres less than the company appears to be entitled to from your statement, which makes no reference to the discrepancy. On inquiring in relation thereto at the railroad division of your office, it is learned that the N. W. ¼ of the S. E. ¼ of sec. 29, T. 41 N., and the S. E. ¼ of sec. 33, T. 42 N., R. 13 W., aggregating 200 acres—more than enough to cover this and another slight deficiency referred to hereafter—are included in presidential proclamation No. 874, dated February 20, 1882, and thereby set apart for reservoir purposes under the river and harbor bills of June 17, 1878 (20 Stat., 162); June 14, 1880 (21 Stat., 193), and March 3, 1881 (21 Stat., 481).

"Of the lands in said list it is stated by you that 5,987.60 acres thereof are within the common ten-mile limits of the Omaha Company and the Wisconsin Central railroad under the grant of 1864. They are also within the fifteen-miles limit of the Omaha Company under the act of 1856, and were withdrawn for the purpose of that grant when the act of 1864 was passed, under which alone the Central Company claims. It was decided by this department, in a former consideration of these grants, that the withdrawal under the act of 1856 reserved the land therein from the operation of the act of 1864 in favor of the Wisconsin Central Company. See case of Chicago, St. Paul, Minneapolis & Omaha Railroad Company (6 L. D., 195). The same question has been more recently considered by this department in the case of the said Wisconsin Central railroad, decided January 24, 1890 (10 L. D., 63), when the former ruling was adhered to.

"Inasmuch as it appears that, as reported by you, 'the Omaha Company lacks the amount above stated in order to make its approvals equal to one-half of the common area,' and the land is there,

vacant and unincumbered, I have approved list 13 for 7,603.87 acres, and herewith send the same to you.

"The adjustment made by you, after charging the company with all the approvals made, also with the 501.80 acres on which the fees have not been paid and the two hundred acres withheld under the President's proclamation, shows the main line requires 15,243.59 acres and the branch line 15,683.11 acres of indemnity lands, aggregating 30,906.70 acres, to satisfy the grant. To meet this amount list 14 for 21,810.69 acres and list 15 for 9,083.91 acres are sent for my approval. These two lists aggregate 30,894.60 acres, and fall short of the exact amount due by 12.10 acres. This deficiency in the indemnity, being less than the smallest legal subdivision, cannot well be made up; but with it the adjustment is brought as near exactness as, perhaps, is possible.

"The lands in list 15 are stated to be within the primary limits of the grant to the Northern Pacific Railroad Company under its grant of July 2, 1864 (13 Stat., 365). They are also stated to be within the primary limits of the unconstructed portion of the Wisconsin Central railroad between Ashland and Superior,
101 being likewise within the fifteen-miles limits of the Omaha grant under the act of 1856. As before stated, the question of the right of the Wisconsin railroad within these limits has heretofore been decided adversely to that company by this department, which decision was subsequently and very recently adhered to. The same reasoning, as to the exclusion of the Central Company from those limits, might apply with equal force, perhaps, to the Northern Pacific Railroad Company; therefore I see no reason why said apparent conflicts should not be disregarded and the lists approved. Entertaining these views, I have this day approved list 14 for 21,810.69 acres and list 15 for 9,083.91 acres, which are herewith sent you.

"On October 22d last, in view of the fact that the Northern Pacific Railroad Company had filed a protest in your office against the issue of patents to the Omaha Company for certain lands claimed to be of the granted lands of the first-named company, you were instructed to suspend the issue of patents on lands in approved lists and which were within the primary limits of the Northern Pacific grant. Since the date of that letter, on November 25, 1889, the Northern Pacific Railroad Company has withdrawn its said protest. It is, therefore, no longer an obstacle in the way of issuing the patents, and the order of suspension is revoked. I inclose said protest and the withdrawal thereof to you for record.

"On the same day that the protest was withdrawn Messrs. Britton and Gray, in behalf of the Omaha Company, filed an application to have the approval of list 8 canceled as to certain designated tracts, and, in lieu thereof, to have certain other designated tracts substituted. It is stated in the application that the tracts to be stricken out are within the twenty-mile limits of the Omaha grant, whilst the tracts to be substituted are within the fifteen-mile limits thereof and nearer the basis of loss and comprise lands heretofore sold by the company to innocent purchasers whose title it is now

anxious to protect; and, further, that by this substitution it is believed litigation with the Northern Pacific Company would be avoided. This application was referred to you, and your report thereon is now before me.

"In that report it is admitted that the lands asked to be substituted are nearer the basis of loss than the tracts in the twenty-mile limits, but you designate certain other tracts within the
102 fifteen-mile limits as being even nearer to the granted lands, and which, therefore, in your opinion, should more properly be substituted than the lands now designated by the company, if such substitution be allowed.

"The act of June 3, 1856 (11 Stat., 20), and the act of May 5, 1864, (13 Stat., 66), under the provisions of which the Omaha Company obtains its grants, both require that indemnity lands shall be selected from the public lands 'nearest to the tier' of granted sections. This being so, it was error in your office to have placed upon the list sent me for approval as indemnity lands beyond the fifteen-miles limit when there were vacant and unappropriated lands within that limit, subject to the claim of the company. Therefore I think it eminently proper, on the facts shown, that the substitution should be made as proposed in your report.

"On receipt hereof you will, therefore, cancel the approval of list 8, as to the specified lands, aggregating 3,854.73 acres, and substitute in place thereof, in a new list to be submitted for my approval, the tracts designated in your said report or any other lands, aggregating said amount, which may be nearest the tier of granted sections and bases of loss.

"Herewith is sent for record the application of the company above referred to.

"This will close the adjustment of the grant for the Chicago, St. Paul, Minneapolis & Omaha Company, and there is no longer any reason why the lands withdrawn for indemnity purposes under its grants should remain in reservation. On August 17, 1887, an order was issued directing the restoration of said lands on certain conditions. 6 L. D., 92. On September 9, 1887, before the order became effectual, it was suspended, and no further action has since been taken looking to said restoration.

"I now direct that all lands under withdrawals heretofore made and held for indemnity purposes under the grants for the benefit of the Chicago, St. Paul, Minneapolis & Omaha Company be restored to the public domain and opened to settlement under the general land laws: Provided the restoration shall not affect rights acquired within the primary or granted limits of any other congressional grant. This order, however, will not take effect or be so construed as to authorize the acquisition or recognition of any rights to said lands or any portion thereof until thirty days' notice
103 thereof, through advertisement, shall have been previously given by the officers of the district land offices."

Twenty-sixth. Patent from the State of Wisconsin to the plaintiff, recorded in vol. 5 of Railroad Records, page 516, the operative

words of which and part of the lands therein described are as follows:

"UNITED STATES OF AMERICA, }
"*State of Wisconsin.* }

"Jeremiah M. Rusk, governor, to all to whom these presents shall come, Greeting:

"Whereas, by an act of Congress, approved May 5, 1864, entitled 'An act granting lands to aid in the construction of certain railroads in the State of Wisconsin,' certain lands were granted to said State to aid in the construction of a railroad from Portage City, Berlin, Doty's island, or Fond du Lac in a northwestern direction to Bayfield and thence to Superior, on Lake Superior; which said grant was duly accepted by said State; and

"Whereas provision was made in said act that, whenever the company to which said grant may be transferred shall have completed twenty consecutive miles of said road in the manner therein provided, patents shall issue conveying to the company entitled thereto the lands granted as aforesaid on each side of said road or so far as the same is completed and coterminous therewith; and

"Whereas said grant was conferred, by due legislation of said State, upon corporations which, by consolidation and otherwise, are now the Wisconsin Central Railroad Company; and

"Whereas it appears that the said Wisconsin Central Railroad Company, a corporation created by and existing under the laws of Wisconsin, being thereunto duly authorized by said legislation, has constructed and completed in the manner prescribed by the act of Congress aforesaid, and in conformity to said laws of the State of Wisconsin in that behalf made, its road from Portage City to Stevens' Point and also from Menasha or Doty's island to Stevens' Point and thence to Ashland, on Lake Superior; and

"Whereas the construction and completion of said railroad has been duly proven and certified so as to entitle said company to patents for so much of said lands granted aforesaid as are situated on either side of and are coterminous with said completed portions of said road; and

104 "Whereas said Wisconsin Central Railroad Company, by the construction and completion of said railroads aforesaid in conformity to the said act of Congress and laws of Wisconsin, is entitled to receive under said legislation patents for the lands hereinafter described, among others:

"Now, therefore, know ye that the State of Wisconsin, in consideration of the premises and for the purpose of fulfilling said act of Congress and laws of Wisconsin in the premises, does hereby remise, release, quitclaim, and convey unto said Wisconsin Central Railroad Company, its successors and assigns, the land hereinafter described and all the right, title, and interest which the said State received or has acquired in and to the same under or by virtue of the act aforesaid and the acts and resolutions, if any, amendatory and explanatory thereof, to wit: * * *

"All fractional section 1, east fractional half of section 3, east half northeast quarter of section 9, southeast quarter section 9, northwest quarter section 11, northeast quarter of northwest quarter of section 11, south half of northwest quarter of section 11, and south half of section 11, northeast quarter of northeast quarter of section 13, south half of northeast quarter of section 13, southeast quarter of section 13, east half of southwest quarter of section 13, southwest quarter of southwest quarter of section 13, all of section 15, * * * containing, by estimation, in the aggregate, 188,160.26, be the same more or less:

"To have and to hold the said lands above described to the said Wisconsin Central Railroad Company, its successors and assigns, in fee simple forever, free from any claim thereto or any part or parcel thereof, by the State of Wisconsin, under or by virtue of the grant aforesaid.

"In testimony whereof I, Jeremiah M. Rusk, governor of the State of Wisconsin, have hereunto set my hand and caused [SEAL.] the great seal of said State to be affixed. Done at the capitol, in the city of Madison, Wisconsin, this twenty-fifth day of February, A. D. 1884.

"J. M. RUSK.

"By the governor:
"ERNST G. TIMME,
"*Secretary of State.*"

Recorded February 25, 1884, in volume 5 of Records of Railroad Lands, pages 510–551.

105 It appears from the laws of Wisconsin chapter 127, Laws 1887) that about four hundred acres of said lands above described are situate within the city limits of Ashland, namely, the east fractional half of section 3, east half of northwest quarter and southeast quarter of section 9, town. 47, range 4 west.

Twenty-seventh. Also agreement between Wisconsin Central Railroad Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company adjusting the overlap of grant between the Bayfield branch and the Wisconsin Central Railroad Company at or near Ashland as follows:

(Copy.)

"Memorandum, made this 12th day of February, 1884, between the Wisconsin Central Railroad Company, hereinafter termed 'the Central Company,' and J. A. Stewart and Edwin H. Abbot, 'trustees' in possession of the Wisconsin Central railroad, hereinafter termed 'the trustees,' parties of the first part, and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, hereinafter termed 'the Omaha Company,' party of the second part, of adjustment of controversy existing between the said two companies as to lands in the overlap of the grants made by the acts of June 3, 1856, and May 5, 1864, to the State of Wisconsin to aid in the construction of the railways of the two companies.

"SECTION I. It is agreed that the Central Company shall have:

"1st. All the railroad lands in township 47, range 5, situate within the six-mile limits of the grant of the Omaha Company.

"2d. All that part of the four-mile strip outside of the six-mile — of Omaha and within the ten-mile limit of the Central Company's grant, and within townships 45, 46 and 47, ranges 4 and 5 west.

"3d. Also the undivided one-half of the lands of the Omaha grant, between the six and fifteen mile limits under the act of June 3, 1856, where the same is overlapped by the Wisconsin Central indemnity limit in township 43, ranges 4 and 5 west; township 44, ranges 4, 5 and 6, and township 45, ranges 4 and 5 west.

106 "4th. The undivided half of that part of the Omaha indemnity lands lying between the fifteen-mile limit of the grant of 1856 and the twenty-mile limit of the grant of 1864, which is overlapped by the indemnity limits of the Wisconsin Central grant, and embraced in township 42, ranges 4 and 5, township 43, ranges 4 and 5, and township 44, range 4.

"SECTION II. The Omaha Company is to apply for, and take from the State to it, patents to the lands embraced in the foregoing subdivisions 1, 2 and 3, and it is to take patents from the State for the undivided half of the lands described in the foregoing subdivision 4.

"SECTION III. The Central Company is to apply for and take patents, as for its account, from the State to Henry F. Spencer, to the undivided one-half of the land described in the subdivision 4 of section I.

"SECTION IV. The Omaha Company will, upon receiving from the State patents to lands described in the foregoing subdivisions 1 and 2, execute and deliver to Henry F. Spencer a deed conveying the said land by quitclaim to said Spencer, except so much thereof as shall have been contracted to be sold by the Omaha Company. And as to lands so contracted to be sold by the Omaha Company, the said company shall carry out said contracts and account to said Spencer for the proceeds of the sales under the said contracts.

"SECTION V. The Omaha Company is to hold title to the lands described in the subdivision 3, and is to manage and sell the same, with the concurrence of the Central Company or the said trustees, and is to account to the Central Company or to said trustees for one-

half of the net proceeds of the sales of said lands. Provided, that all contracts heretofore made by the Omaha Company for the sale of any of the lands embraced in the said subdivision 3 are to be carried out by the said company, and it is to account as to said lands to the Central Company or to said trustees for one-half of the proceeds under said contracts.

"SECTION VI. As to the lands described in subdivision 4, the title to which is to be in the Omaha Company and said Henry F. Spencer, they shall be managed and sold by the Omaha Company, with the concurrence of said Spencer, or his agent; and the Omaha Company shall account to said Spencer for one-half of the net proceeds thereof, and one-half of all the net income derived therefrom.

107 "SECTION VII. The Central Company and said Stewart and Abbot, trustees, are to withdraw all objection to the patenting by the State of Wisconsin or the United States, or both, to the Omaha Company, its successors and assigns, of any or all lands within the overlap of said grants in Wisconsin, except such lands as lie east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly ten-mile limit of the Central Company; and the said Central Company and the said trustees are to execute and deliver to the Omaha Company such instruments of consent to the patenting of said lands to the Omaha Company as shall from time to time be requested by said Omaha Company.

"SECTION VIII. The Central Company is to have the trespass money in the State treasury, so far as the same can be traced, collected from the lands described in subdivisions 1 and 2, and one-half of the said trespass money in the State treasury, so far as the same can be ascertained, collected from the lands in subdivisions 3 and 4, less a proper proportion for expense of collecting by the State.

"SECTION IX. The Central Company is to cause its solicitor or solicitors in the case of the Madison & Portage Railway Company against the North Wisconsin Railway Company and others, commenced in the circuit court of the United States for the western district of Wisconsin, now pending on appeal in the Supreme Court of the United States, to file such stipulation in the latter court for the dismissal of its appeal in said cause, without cost or expense howsoever to it, as shall be necessary to procure the dismissal of said appeal; and likewise to file such stipulations in said cause in the circuit court, after the said appeal shall have been dismissed, as shall be necessary to the execution of said decree, and settlement of the accounts of the receiver therein and the like, without cost to the Wisconsin Central.

"SECTION X. It is understood and agreed that on the conveyance by the Omaha Company of the said lands hereinabove described, or any thereof, it shall reserve to itself, its successors and assigns, a right of way one hundred feet in width for its railway over the same; and it is understood also that the right of way for the Ashland Railway Company, as now located and constructed, over any of the lands above described, shall be conveyed to the Ashland Railway Company free of cost.

108 "SECTION XI. It is expressly understood and agreed that in conveying the lands described in subdivision 3, the Omaha will execute deeds when required, with covenants of warranty, upon being satisfactorily indemnified by the Central Company from one-half the lessor costs, if any, at any time to arise or grow out of a breach of said warranty.

"SECTION XII. The Omaha Company consents that the Central Company shall take patents for all the lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly ten-mile limit of the Central Company, and agrees to assist the Central Company to get such patents from the State of Wisconsin.

"In witness whereof the said Omaha Company has caused this memorandum to be signed on its behalf by Marvin Hughitt, its president, and the said Central Company has caused it to be signed on its behalf by Edwin H. Abbott, its vice-president, and said trustees, J. A. Stewart and Edwin H. Abbott, have hereunto set their hands the day and year hereinbefore first written.

"NOTE.—This memorandum is executed in triplicate.

"WISCONSIN CENTRAL R. R. CO.,
"By EDWIN H. ABBOTT, *Vice-President.*
"JOHN A. STEWART, } *Trustees.*
"EDWIN H. ABBOTT, }
"By EDWIN H. ABBOTT, *Trustee in Charge.*
"CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY CO.,
"By MARVIN HUGHITT, *President.*"

Twenty-eighth. A deed of release from the Chicago, St. Paul, Minneapolis & Omaha Railway Company to the Wisconsin Central Railroad Company, dated February 19, 1887, as follows:

"Whereas the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Wisconsin Central Railroad Company have compromised and settled their respective conflicting claims to the lands embraced within the grants made by acts of Congress respectively approved June 3, A. D. 1856, and May 5, A. D. 1864, to the State of Wisconsin for railroad purposes, arising from the overlapping limits of the grants under which said companies respectively claim:

109 "Now, therefore, in consideration of the premises, said Chicago, St. Paul, Minneapolis & Omaha Railway Company hereby surrenders and waives all its right of whatsoever nature to claim or select any lands lying within the overlapping limits of the grants of public lands to the State of Wisconsin to aid in the construction of the lines of railway therein severally designated in said acts of Congress contained which lie easterly of a line drawn as follows, to wit:

"Commencing at the point of intersection of the southeasterly shore of Chequamegon bay by the west line of section thirty-four (34), township forty-eight (48) north, of range four (4) west, thence south along the west line of said section and the west line of sections num-

bered respectively three (3), ten (10), fifteen (15), twenty-two (22), and twenty-seven (27), all in township forty-seven (47) north, of range four (4) west, to the southeast corner of section twenty-eight (28), town. and range aforesaid; thence west along the south line of said section twenty-eight (28) to the south quarter post of said section twenty-eight (28); thence south along the north and south center line of section thirty-three (33), township forty-seven (47) north, of range four (4) west, and sections numbered respectively four (4), nine (9), and sixteen (16), township forty-six (46) north, of range four (4) west, to the south line of section sixteen (16), town. and range last aforesaid; thence west to the north quarter post of section twenty (20), town. and range last aforesaid; thence south along the north and south center line of sections numbered respectively twenty (20), twenty-nine (29), and thirty-two (32) to the south quarter post of section thirty-two (32), township forty-six (46) north, of range four (4) west; thence west to the north quarter post of section six (6), township forty-five (45) north, of range four (4) west; thence south on the north and south center line of sections numbered respectively six (6), seven (7), and eighteen (18) to the centre of said section eighteen (18), townships forty-five (45) north, of range four (4) west; thence west along the east and west center line of said section eighteen (18), township forty-five (45) north, of range four (4) west, and the east and west center line of section thirteen (13), township forty-five (45) north, of range five (5) west, to the center of said section thirteen (13), town. and range last aforesaid; thence south to the north quarter post of section twenty-four (24), township forty-five (45) north, of range five (5) west; thence east to the northeast corner of section twenty-

140 four (24), township forty-five (45) north, of range five (5) west; thence south on the east line of sections numbered respectively twenty-four (24) and twenty-five (25), township forty-five (45) north, of range five (5) west, to the northwest corner of section thirty-one (31), township forty-five (45) north, of range four (4) west; thence east along the north line of section thirty-one (31) last aforesaid to the northeast corner of said section thirty-one (31); thence south on the east line of said section thirty-one (31) to the southeast corner of said section thirty-one (31), township forty-five (45) north, of range four (4) west; thence east on the north line of section five (5), township forty-four (44) north, of range four (4) west, to the northeast corner of said section five (5); thence south on the east line of sections numbered respectively five (5) and eight (8), township forty-four (44) north, of range four (4) west, to the northwest corner of section sixteen (16), township forty-four (44) north, of range four (4) west; thence east on the north line of section sixteen (16) to the northeast corner of section sixteen (16) last aforesaid; thence south on the east line of said section sixteen (16) to the northwest corner of section twenty-two (22), township forty-four (44) north, of range four (4) west; thence east on the north line of section twenty-two (22) to the northeast corner of said section twenty-two (22); thence south on the east line of said section twenty-two (22) to the northwest corner of section twenty-six (26), township forty-four (44) north, of range four (4)

west; thence east on the north line of section twenty-six (26) to the northeast corner thereof; thence south on the east line of sections numbered respectively twenty-six (26) and thirty-five (35), township forty-four (44) north, of range four (4) west, to the northwest corner of section one (1), township forty-three (43) north, of range four (4) west; thence east on the north line of section one (1), township forty-three (43) north, of range four (4) west, to the northeast corner of said section one (1); thence south on the east line of said section one (1) to the southeast corner of said section one (1), township forty-three (43) north, of range four (4) west; thence west to the southwest corner of the southeast quarter (¼) of the southwest quarter (¼), section one (1), township forty-three (43) north, of range four (4) west; thence south to the southeast corner of the southwest quarter (¼) of the northwest quarter (¼), section twenty-four (24), township forty-three (43) north, of range four (4) west; thence west to
111 the center of section twenty-three (23), township forty-three (43) north, of range four (4) west; thence south along the north and south center line of sections numbered respectively twenty-three (23), twenty-six (26), and thirty-five (35), township forty-three (43) north, of range four (4) west, to the center of said section thirty-five (35), township forty-three (43) north, of range four (4) west; thence west on the east and west center line of sections numbered respectively thirty-five (35) and thirty-four (34), township forty-three (43) north, of range four (4) west, to the center of section thirty-four (34), township forty-three (43) north, of range four (4) west; thence south on the north and south center line of section thirty-four (34), township forty-three (43) north, of range four (4) west, and sections numbered respectively three (3) and ten (10), township forty-two (42) north, of range four (4) west, to the north quarter post of section fifteen (15) of said town. and range; thence west on the north line of sections numbered respectively fifteen (15) and sixteen (16) to the north quarter post of section sixteen (16), township forty-two (42) north, of range four (4) west; thence south on the north and south center line of section sixteen (16) last aforesaid to the south quarter post of said section sixteen (16); thence west to the northwest corner of section twenty-one (21), township forty-two (42) north, of range four (4) west; thence south on the west line of said section to the southwest corner of said section twenty-one (21), township forty-two (42) north, of range four (4) west; thence west on the north line of section twenty-nine (29), township forty-two (42) north, of range four (4) west, to the northwest corner of said section; thence south on the east line of sections numbered respectively thirty (30) and thirty-one (31) to the south line of township forty-two (42) north, of range four (4) west.

"Said Chicago, St. Paul, Minneapolis & Omaha Railway Company intends to surrender unto said Wisconsin Central Railroad Company all lands within the overlapping limits of said grants which lie easterly of the easterly ten-mile limit of the Bayfield branch of said Chicago, St. Paul, Minneapolis & Omaha railway and northerly and easterly of the westerly ten-mile limit of the Wisconsin Central Railway Company, and hereby consents that said lands be conveyed by

the United States to the State of Wisconsin for the use and benefit of the Wisconsin Central Railroad Company, or that the same be patented by the United States to said Wisconsin Central Railroad Company as may be appropriated in accordance with the se-
112 lection thereof heretofore made or hereafter to be made by or for said Wisconsin Central Railroad Company as of lands within its land grant under said acts of Congress above mentioned.

"Witness the corporate seal of said Chicago, St. Paul, Minneapolis & Omaha Railway Company and the hands of its president and secretary, thereunto lawfully authorized, this nineteenth day of February, A. D. eighteen hundred and eighty-seven (1887).

"CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.,

[CORPORATE SEAL.] "By M. HUGHITT, *President.*

"Countersigned:

"E. E. WOODMAN, *Secretary.*"

At the trial the plaintiff admitted the facts stated in the second and third defenses set up by the defendant, but not the conclusions of law therein contained.

J. F. VAN DUZER, for plaintiff, testified as follows:

I reside at Ashland, Wisconsin; am a dealer in real estate. I have lived there between four and five years. I know the southwest quarter of section eleven, town. forty-seven, range four west. It is one hundred and sixty acres. It is timber land, covered principally with pine. Its value is about fifty dollars an acre. In other words, I think the quarter section is worth about eight thousand dollars. It is half a mile from the city limits of Ashland, if I remember right; half mile from the nearest line of the city limits, and near the railroad. It is, I believe, about three-quarters of a mile to the Central railroad.

LOUIS OETTELL, for plaintiff, testified as follows:

I reside at Ashland; have lived there about nine years; am engaged in looking up lands and farming. I know the southwest quarter of section eleven, town. forty-seven, range four west.
113 It is mostly covered with small pine; most of it is Norway; am acquainted with the value of lands up in that country to some extent, and know how they have been selling. In my judgment this quarter section is worth all the way from forty to sixty dollars per acre. In round numbers I think the value of the quarter section is between seven thousand and eight thousand five hundred dollars. The land is half a mile from the city limits. It is no more than half a mile from the Wisconsin Central railroad.

Chapter 174 of the Laws of 1865 offered in evidence by defendant's counsel.

Chapter 83 of the Private and Local Laws of 1872, approved March 22, 1872, entitled "An act repealing the charter of the St. Croix & Lake Superior R. R. Co., and all acts amendatory thereof," offered

by plaintiff, and also chapter 84 of the Laws of 1869, approved March 5, 1869.

It is admitted by the parties to this suit that no patent to these lands was ever issued by the United States to the State.

Defendant moved the court to direct a verdict in its favor.

The foregoing is the substance of all testimouy produced on the trial of this action.

Thereupon the court charged the jury that the jury should find for the defendant; to which ruling and instruction counsel for the plaintiff did then and there except.

The jury thereupon returned a verdict in favor of the defendant, finding that he is not guilty, and that the value of the lands claimed in the suit is the sum of eight thousand dollars; and thereupon judgment upon the merits was rendered in favor of the said defendant and against the plaintiff, with costs, as stated in the record in this action.

And because the matters so produced and given in evidence on the trial of said action and the said several rulings of said
114 court in relation thereto and the said several exceptions so taken by said plaintiff thereto do not appear upon the record of the trial of said action, the said court, at the term aforesaid, has allowed, signed, sealed, and settled the foregoing bill of exceptions according to the statute in such case made and provided and the rules and practice of said court.

Dated June 16, 1891.

R. BUNN, *Dist. Judge.* [SEAL.]

Endorsed as follows:

"Circuit court of the United States, western district of Wisconsin. Wisconsin Central R. R. Co. *vs.* William O. Forsythe. Bill of exceptions. Filed June 16, 1891. F. M. Stewart, clerk."

And afterwards, on the 26th day of June, A. D. 1891, came said plaintiff, by its attorneys, and filed its bond on appeal and citation on writ of error, with proof of service thereof, as follows, to wit:

115 Know all men by these presents that we, De Witt C. Ramsay and Herman T. Lerdall, of the city of Madison and State of Wisconsin, are held and firmly bound unto William O. Forsythe, in the full and just sum of five hundred dollars ($500.00), to be paid to the said William O. Forsythe, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a term of the circuit court of the United States for the western district of Wisconsin, in a suit depending in said court between The Wisconsin Central Railroad Company, plaintiff, and the said William O. Forsythe, defendant, judgment was rendered against the said Wisconsin Central Railroad Company, and the said Wisconsin Central Railroad Company having obtained a

writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the aforesaid suit, and a citation directed to the said William O. Forsythe, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the 25th of July next:

Now, the condition of the above obligation is such that if the Wisconsin Central Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

DE WITT RAMSAY. [SEAL.]
HERMAN T. LERDALL. [SEAL.]

Sealed and delivered in presence of—
CHAS. N. GREGORY.

WESTERN DISTRICT OF WISCONSIN, *ss:*

De Witt C. Ramsay and Herman T. Lerdall, of Madison, in said district, being duly and severally sworn, each for himself says that he is worth the sum of one thousand dollars over and above all debts by him owing and all exemptions by law in property situated in the State of Wisconsin.

DE WITT RAMSAY.
HERMAN T. LERDALL.

Subscribed and sworn before me—
CHAS. N. GREGORY,
Notary Public, Dane County, Wisconsin.

June 26, 1891.

116 Endorsed as follows:

"United States circuit court, west. dist. of Wisconsin. The Wisconsin Central Railroad Company *vs.* William O. Forsythe. Bond on writ of error. The within bond is hereby approved this June 26, 1891. R. Bunn, dist. judge. Filed June 26th, 1891. F. M. Stewart, clerk."

117 The United States of America to William O. Forsythe, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the twenty-fifth day of July next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein The Wisconsin Central Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Su-

preme Court of the United States, this 26th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

R. BUNN,
Dist. Judge.

118 [Endorsed:] Supreme Court of the United States. The Wisconsin Central Railroad Company, plaintiff in error, *vs.* William O. Forsythe, def't in error. Citation. Due service admitted June 26th, 1891. Geo. G. Green, att'y for d'f't. Filed June 26, 1891. F. M. Stewart, clerk.

119 WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing with the original record and proceedings now remaining of record and on file in my office in the above-entitled cause, and that it is a correct transcript therefrom, and also a true copy of the security on the writ of error and of the endorsements thereon and the original citation and service thereof under said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in the city of Madison, this 30th day of June, 1891.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

120 UNITED STATES OF AMERICA, *Western District of Wisconsin,* } *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate—being copy of the opinion of the court on motion for a new trial, setting aside the first verdict, filed Sept. 15, 1890—with the original now in my custody, and they are true copies of their respective originals and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Madison, in the said western district of Wisconsin, this thirtieth day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART, *Clerk.*

121 Circuit Court of the United States, Western District of Wisconsin.

WISCONSIN CENTRAL RAILROAD COMPANY, Plaintiff,
vs.
WILLIAM O. FORSYTHE, Defendant.
} Ejectment.

Before Harlan, circuit justice, and Bunn, district judge.

Mr. Justice Harlan delivered the opinion of the court.

122 This action of ejectment involves the title to the southwest quarter of section eleven, town forty-seven north, of range four west, in Ashland county, Wisconsin, which the plaintiff, The Wisconsin Central Railroad Company, claims to own and of which the defendant, William O. Forsythe, is in possession. The latter asserts title in himself, and denies that the company has any interest in the premises. The plaintiff's claim of ownership rests primarily upon the third section of an act of Congress approved March 5, 1864, granting lands to Wisconsin in aid of the construction of railroads in certain parts of that State. The defendant, denying that the lands in dispute were included in those so granted, avers that they constituted a part of other lands which, at the time of the passage of the above act, were reserved to the United States for the purposes of a previous act, approved June 3, 1856, granting lands to aid in the construction of certain railroads in the same State. The defense is also based upon certain proceedings and decisions in the Interior Department, under or in consequence of which the defendant was permitted to enter and did enter the lands in dispute in accordance with the laws of the United States relating to the public domain.

After the evidence was concluded the jury were directed to return a verdict for the plaintiff, subject to the opinion of the court on a motion for judgment upon the verdict or on a motion for new trial. Such a verdict having been returned, the jury were discharged. The case is now before the court upon a motion by the plaintiff for judgment in its favor as well as upon a motion by the defendant to set aside the verdict and award a new trial.

The principal question is whether the premises in dispute
123 were part of the lands granted by the third section of the act of 1864 in aid of the construction of the road therein mentioned, which road is now owned and operated by the plaintiff. As the acts of 1856 and 1864 relate to the same general subject, we will be aided in our interpretation of the latter by ascertaining what was done prior to its passage in execution of the former.

The act of June 3, 1856, is entitled "An act granting public lands to the State of Wisconsin to aid in the construction of certain railroads in said State," and is in these words:

"That there be, and is hereby, granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the St. Croix river or lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the State

line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus se-
124 lected in lieu of those sold and to which pre-emption has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purpose aforesaid; provided, that the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads; provided further, that the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever. And provided further, that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"2. That the sections and parts of sections of land which by such grant shall remain to the United States, within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold, nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

"3. That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the pur-
125 poses aforesaid, and no other, and the said railroads shall be and remain public highways for the use of the Government of the United States free from toll or other charge upon the transportation of property or troops of the United States.

"4. That the lands hereby granted to said State shall be disposed of by said State only in the manner following, that is to say, that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads respectively, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like

quantity of land hereby granted may be sold, and so from time to time until said roads are completed, and if said roads are not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.

"5. That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: Provided, that until such price is fixed by law the Postmaster General shall have the power to determine the same." 11 Stat., 21.

In anticipation, as we suppose, of the passage of this act the Commissioner of the Land Office, under date of May 29, 1856, directed the registers and receivers at La Crosse, Hudson, Mineral Point, Menasha, Stevens' Point, and Superior, Wisconsin, to suspend from sale and location all the lands in their respective districts until further orders, and on the 12th of June, 1856, he sent to the same officers a communication in these words: "By my telegraphic dispatch of the 29th ult. you were requested to suspend from sale or location until further orders all the lands in your dis-
126 tricts. The object of this withdrawal was to protect the lands from sale granted to the State for railroad purposes by a bill which has passed both houses of Congress, which having been approved by the President on the 3d instant and thus become a law, I have to request that you will continue the reservation until otherwise directed. The governor has this day been advised and requested to furnish in advance sketch maps of the route of the roads with a view of releasing as many of the lands as can be safely released without interfering with the public limits of selection, and also of the maps of actual final locations, on the receipt of which latter a further reduction may be made."

The grant contained in the above act was formally accepted by the State by an act approved October 8, 1856—Laws of Wisconsin, 1856, c. 118—and by an act approved October 11, 1856, it conferred the benefit of the grant upon the La Crosse and Milwaukee Railroad Company, a corporation of Wisconsin. Laws of Wisconsin, 1856, c. 122.

On the 26th of October, 1856, the Commissioner of the General Land Office issued an order to the registers and receivers at Superior City, Hudson, and Eau Claire, Wisconsin, in which he said: "Upon the filing in your office of duly certified map of the line of route, as definitely fixed, of any of the roads referred to in the act entitled An act granting public lands to the State of Wisconsin to aid in the construction of railroads in such State, approved June 3, 1856, you will, without waiting for further instructions from this office, cease to permit locations, by entries or pre-emption or for any purpose whatever, of the land within fifteen miles of the route."

By an act approved March 5, 1857, the St. Croix and Lake
127 Superior Railroad Company, a Wisconsin corporation, was authorized to receive from the La Crosse and Milwaukee Railroad Company all the latter's right, title, and interest in the above lands or any part thereof lying north of the point or place where

the road of the La Crosse and Milwaukee Railroad Company "shall intersect the St. Croix river or lake or other point which may be determined upon by the last-named company, or such portion of said lands as said companies may agree upon." Laws of Wisconsin, 1857, c. 230. Under this act a deed of division was made March 10, 1857, between the La Crosse and Milwaukee Railroad Company and the St. Croix and Lake Superior Railroad Company. By that deed the former company conveyed to the latter all its interest "in and to every alternate section of land, designated by odd numbers, for six sections in width on each side of said road from the point aforesaid on the St. Croix river or lake to the west end of Lake Superior and from any point on said last aforesaid route to Bayfield, together with such lands within fifteen miles of the line or route of said road or roads as shall be selected in pursuance of said act of Congress (June 3, 1856) in lieu of any sections which shall have been sold by the United States or to which the right of pre-emption has attached." This deed was recorded in the office of the secretary of state of Wisconsin November 19, 1857. The map of definite location of the main line of the St. Croix and Lake Superior Railroad Company, north from St. Croix river or lake to the west end of Lake Superior, was filed March 2, 1858; that of its Bayfield branch July 17, 1858. These maps were filed under the act of June 3, 1856.

On the first of March, 1859, after the final location of the Bayfield branch, the Commissioner of the General Land Office made an order, addressed to the proper registers and receivers, in these
128 words: "For your information in the matter I enclose herewith a diagram of the district of lands, subject to sale at your office, upon which has been designated the line of route and the lines of six and fifteen miles limits of the St. Croix and Lake Superior and the Bayfield line of railroads, to aid in the construction of which a grant of lands was made to the State of Wisconsin by act of June 3, 1856. As all the vacant lands in the odd-numbered sections, outside the six and within the fifteen miles limits of the roads, have been selected by the agent of the State in lieu of the lands sold and pre-empted in the alternate sections granted by the above-mentioned act, such grants you will, of course, continue to reserve, as heretofore, from sale or location for any purpose whatever."

Our attention will now be turned to the act of Congress of May 5, 1864, 13 Stat., 66, c. 80. At the time that act was passed only sixty-one miles of the roads contemplated by the act of Congress of June 3, 1856, had been constructed, namely, the road from Portage to Tomah. That part was constructed by the La Crosse and Milwaukee Railroad Company in the spring of 1858. Nothing had then been done in respect to other portions of the roads north of Tomah and towards the west end of Lake Superior and to Bayfield except to file maps of the definite location of routes, and even that much was not done in relation to the road mentioned in the act of 1856, from Fond du Lac to Lake Winnebago northerly to the State line.

As the decision of this case turns principally upon the construc-

tion to be given to the act of May 5, 1864, its full text will be given. It is entitled "An act granting lands to aid in the construction of certain railroads in the State of Wisconsin," and is as follows:

129 "That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake between townships twenty-five and thirty-nine, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by said company, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State for the use and purpose aforesaid: Provided, That the lands to be so selected

130 shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June 3, 1856, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist.

"2. That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from the town of Tomah, in the county of Monroe, in said State, to the St. Croix river or lake, between townships twenty-five and thirty-one, every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress granting lands to said State to aid in the construction of certain railroads, approved June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the said act of June three, eighteen hundred and fifty-six. But in case it shall appear that the United States

have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections, or parts of sections, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by said State to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States nearest to the tier of sections above specified, as much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has
131 attached, as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State for the use and purpose aforesaid; provided, that the lands to be so located shall in no case be further than twenty miles from the line of said road, nor shall such selection or location be made in lieu of said lands received under the said grant of June three, eighteen hundred and fifty-six, but such selections and locations may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June three, eighteen hundred and fifty-six, should any such deficiency exist.

"3. That there be and is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold reserved or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said State, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands of the
132 United States nearest to the tier of sections above specified, as much public land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which the right of pre-emption or homestead has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State, or by the company to which she may transfer the same, for the use and purpose aforesaid: Provided, that the lands to be so located shall in no case be further than twenty miles from the line of said road.

"4. That the sections and parts of sections of land which shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of the said reserved lands become subject to private entry until the same have been first offered at public sale at the increased price.

"5. That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six be and the same is hereby extended to a period of five years from and after the passage of this act.

"6. That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such
133 reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"7. That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: Provided, however, that no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States.

"8. That the said lands hereby granted shall, when patented as provided in section seven of this act, be subject to the disposal of the companies respectively entitled thereto, for the purpose aforesaid, and no other, and the said railroads be, and shall remain, public highways for the use of the Government of the United States, free from all toll or other charge, for the transportation of
134 any property or troops of the United States.

"9. That if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this act, as provided herein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States." 13 Stat., 66.

By an act of the Wisconsin legislature approved March 20, 1865,

the benefit of this act, so far as it related to the road from the St. Croix river or lake to the west end of Lake Superior and to Bayfield, was granted to the St. Croix and Lake Superior Railroad Company, subject to all the conditions and restrictions imposed upon the State by the said acts of May 5, 1864, and June 3, 1856. Laws of Wisconsin, 1865, c. 175, section 1. This was the same corporation, already referred to, that was allowed to receive from the La Crosse and Milwaukee Railroad Company the benefit of the act of June 3, 1856, relating to the same line of roads.

On the 22d of April, 1865, the St. Croix and Lake Superior Railroad Company, by its executive committee, accepted the grant of lands made by the act of Congress of 1864 and by the above act of the Wisconsin legislature of March 20, 1865, so far as it related to the road from the St. Croix river or lake to the west end of Lake Superior and to Bayfield. That committee also passed a resolution declaring "that the line as now located by maps on file in the Land Office at Washington be the line adopted for the selection of lands conferred on this company by grant."

The plaintiff, The Wisconsin Central Railroad Company (to be hereafter called the Central Company), was formerly the Portage,
Winnebago and Superior Railroad Company, the latter having been formed in 1869 by the consolidation of the Portage
135 and Lake Superior Railroad Company and the Winnebago and Lake Superior Railroad Company, the two constituent companies having been incorporated in 1866 for the purpose (as is recited in the titles of their respective acts of incorporation) of executing the trust created by the act of Congress of May 5, 1864. Laws of Wisconsin, 1866, c. 314; *id.*, c. 362; *id.*, 1869, c. 257; *id.*, 1871, c. 27. It is not controverted in the present cases that the Central Company succeeded to all the rights conferred by the State upon the companies to which were transferred the benefit of the grant of lands contained in the third section of the act of May 5, 1864, nor is it controverted that the road of the Central Company from Stevens' Point to Lake Superior (although not on the precise lines orginally specified) was constructed to Ashland, on Lake Superior, in accordance with the acts of Congress and of the legislature of Wisconsin. It was definitely located November 10, 1869. Its map of definite location was filed in the proper office, and it appeared in evidence that the Commissioner of the General Land Office on the 10th of December, 1869, sent to the register and receiver at Bayfield, Wisconsin, "a diagram of the Portage, Winnebago and Superior railroad under act of May 5, 1864, third section, and joint resolutions 21st June, 1866 (14 Stat., 360), with the ten and twenty-mile limits of the land grant designated thereon," and directed them to withdraw "from sale or location, pre-emption, or homestead entry all the odd-numbered sections of lands falling within those limits."

The road from the St. Croix river or lake to Superior, on
Lake Superior, and the Bayfield branch were constructed
136 and are owned and operated by the Chicago, St. Paul, Minneapolis and Omaha Railroad Company (to be hereafter, for

the sake of brevity, called the Omaha Company), the successor of the St. Croix and Superior Railroad Company and the owner of the rights and privileges granted to the latter company in respect to the above road and branch. The road located under the act of 1856 from a point north of St. Croix river or lake to Bayfield approaches that of the Central Company, located under the act of 1864, as the latter proceeds in a northwesterly course to Ashland, and the place and indemnity limits of the Central road conflict with or overlaps the original fifteen-mile indemnity limits of the Bayfield branch of the Omaha Company.

On the 12th of February, 1884, the Central Company and the Omaha Company entered into an agreement for the adjustment of the controversy between them as to the land in the overlap of the grants made by the acts of Congress of June 3, 1856, and May 5, 1864. By that agreement the Omaha Company consented that the Central Company "should take patents for all the lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company and north and east of the westerly ten-mile limit of the Central Company," while the Omaha Company was to have all the other lands within the overlap of those grants.

The Central Company, having constructed roads from Portage City and from Menasha or Doty's Island to Stevens' Point, thence to Ashland, on Lake Superior, in conformity with the acts of Congress and of Wisconsin, received from the State, February 25, 1884, a a patent "for so much of said lands granted — aforesaid — are situated on either side of and coterminous with said completed portions of said road." The lands in dispute are covered by that patent.

137 On the 19th of February, 1887, the Omaha Company executed to the Central Company a deed of release as to certain lands described by metes and bounds, the deed reciting that the former company intends to surrender to the latter company "all lands within the overlapping limits of said grants which lie easterly of the easterly ten-mile limit of the Bayfield branch of said Chicago, St. Paul, Minneapolis and Omaha railroad and northerly and easterly of the westerly ten-mile limit of the Wisconsin Central Railway Company, and hereby consents that said lands be conveyed by the United States to the State of Wisconsin for the use and benefit of the Wisconsin Central Railroad Company, or that the same be patented by the United States to said Wisconsin Central Railroad Company as may be appropriated in accordance with the selection thereof heretofore made or hereafter to be made by or for said Wisconsin Central Railroad Company as of lands within its said land grant under said acts of Congress above mentioned."

In the year 1887 the Omaha Company applied to the General Land Office for the final adjustment of its land grants under the acts of June 3, 1856, and May 5, 1864. Upon the hearing of that application it was, among other things, determined, October, 1887, by the Secretary of the Interior, upon appeal from the Commissioner of the Land Office, that the lands within the fifteen-miles indemnity limits of the Bayfield road as defined in the act of 1856 were, by virtue of the orders of the Secretary, "reserved to the United States,"

and were not included in the grant in the act of 1864 for the road named in its third section (now the Central railroad), and were so reserved before the passage of the act of 1864 for the purpose of indemnifying the Bayfield road for losses, if any should occur,
138 in its place limits. To that proceeding the Central Company was not a party and of its institution and pendency had no notice. 6 Land Decisions, 190, 194, 196, 209, 210, 217.

On the 2d day of July, 1887, the Central Company listed in the Land Department a large quantity of lands (including the lands in dispute) as having enured to it under and by section three of the act of May 5, 1864.

After the decision of the Secretary of the Interior above referred to the Central Company appeared before the Land Department and demanded a hearing on the above question determined at the time of the adjustment of the grant of the Omaha Company, claiming that such determination was not binding upon it, because that company was not a party to and had not been heard in the proceeding in which it was made; that the lands listed by that corporation were not excluded from the grant in section three of the act of 1864; that their withdrawal by the Secretary was not a reservation to the United States within the meaning of section six of that act, and that if such withdrawal amounted to such a reservation it was revoked and terminated by the act of May 5, 1864. Upon this application the above question was reargued before the Secretary of the Interior in the present year upon an appeal to him by the Central Company. It was held by Secretary Noble, in harmony with the ruling of Secretary Lamar, that the lands within the limits of the indemnity withdrawal made for the benefit of the Bayfield road were, by section 6 of the act of May 5, 1864, excluded from the grant contained in the third section of that act for the Central road, and that the title to all lands within such indemnity withdrawal for the Bayfield road, not ultimately required for the indemnity purposes for which it was made, remained in the United States. 6 Land Dec., 63–77.

Shortly after the decision last referred to the defendant,
139 being a citizen of the United States and over twenty-one years of age, made a formal entry of the lands in dispute, taking all the steps and paying all the charges and fees required by law for such entry.

The lands in dispute, part of those so listed by the plaintiff, are, we may repeat, outside and east of the enlarged place limits (ten sections in width on each side) of the Bayfield branch of the Omaha road as established by the first section of the act of 1864, but (and this is an important fact in the case) are within the fifteen-mile indemnity limits of that road as those limits are defined by the act of 1856. It is also important to observe that they are within the place limits (ten sections in width on each side) of the Central road as established by the third section of the act of 1864. The contention of the plaintiff is that, as the grant in that section was one *in praesenti*, these lands, upon the filing and acceptance of its map of definite location, became its property as of the date of the act of 1864,

subject only to the condition if its road was not completed within the time prescribed by Congress "no further patents shall be issued to said company for said lands and no further sale shall be made and the lands unsold shall revert to the United States." Act of 1864, sec. 9.

It cannot be disputed that the grant of lands in the act of 1856 for the benefit of the Bayfield road was also one *in præsenti*; that prior to the passage of the act of 1864 the company constructing that road had, by the filing and acceptance of its map of definite location, earned its place lands, subject only to the condition prescribed in the act of 1856, that if the road was not completed within the
140 time prescribed such lands as remained unsold should revert to the United States. Section 5. Nor can it be disputed that prior to 1864 all the lands within the fifteen-mile indemnity limits of that road, of which those here in dispute form a part, had been lawfully withdrawn from sale or location in order that the State, with the approval of the Secretary of the Interior, might select therefrom lands to supply deficiencies that may have resulted from previous sales or appropriations by the United States of lands within the place limits of that road as defined by the act of 1856; and yet it is said that Congress intended by the third section of the act of 1864 to grant to the State for the benefit of another road, whose route had not then been located, such part of the indemnity lands of the Bayfield branch as fell within the designated place limits of that other road. It is argued that to this extent, at least, the act of 1856 was superseded and repealed by that of 1864.

At the threshold of the inquiry as to whether the act of 1856 was repealed or superseded we are confronted with these facts: That the act of 1864 contains no words of repeal; that it does not in terms disturb any legal right which had accrued or become vested under the former act; that its first section recognizes the indemnity limits of the Bayfield road as embracing the lands in dispute quite as distinctly as the third section, construed alone, puts them in the place limits of the road mentioned in it; that in four out of nine sections of the act of 1864 the act of 1856, with the terms and conditions, is referred to and its continuing existence, at least, for some purposes is recognized; that when the act of 1864 was passed only eight of the ten years given in the act of 1856 for the completion of the
141 roads therein mentioned had expired, and that the act of 1864, so far from superseding altogether the act of 1856, extends "the time fixed and limited for the completion of the said roads in the act aforesaid of June 3, 1856," to a period of five years from and after the passage of the act of 1864, while it gives ten years from its passage for the completion of the road mentioned in the third section, thus putting the Central road upon a different footing as to time from that prescribed as to the roads mentioned in the act of 1856.

These facts may not be conclusive against the suggestion of repeal, but they certainly tend to show that Congress did not intend to wholly displace the act of 1856.

The act of 1864 undoubtedly took the place of that of 1856 for

certain purposes. While, as was held in Madison & Portage Railroad Company *vs.* State of Wisconsin, etc., decided in 1879, the act of 1856 contemplated or rendered possible the construction by one company of a single continuous road from Madison or Columbus via Portage City and St. Croix river or lake to the west end of Lake Superior and to Bayfield, the continuity of such line was destroyed by the act of 1864, which both divided and enlarged the grant made by Congress in 1856. In the case just cited it was said: "This course was perhaps suggested by the fact, of which we may presume Congress had knowledge, that nearly eight years had elapsed after the State's acceptance of the act of June 3, 1856, without anything whatever being done upon the line west and north of Tomah beyond the mere location of the route from Tomah via St. Croix river or lake to Lake Superior; but whatever considerations may have influenced Congress we are satisfied that the purpose of the act of May 5th, 1864, was to break the continuity of the original line from Tomah via St. Croix river or lake to the west end of Lake Superior
142 and to Bayfield, and to devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by or which could have been made available under the act of 1856." In the same case it was held that Congress intended that all the lands granted by and earned under the act of May 5, 1864, by means of constructed road should be disposed of according to the coterminous principle, under which each road would get the benefit of the lands granted by and earned under that act that were coterminous with each completed section of twenty miles—a mode of disposing of them not absolutely required by the act of 1856. In these and perhaps in other respects not material to be considered the act of 1864 took the place of or superseded the act of 1856. But did it operate to displace the first act to the extent claimed by the plaintiff?

The first section of the act of 1864 certainly gives no support to the position taken by the plaintiff. It discloses, as we have said, no purpose upon the part of Congress to disturb or displace any substantial right vested or acquired under the former act, or to cripple any railroad company that had proceeded under the act of 1856. That act does not make an entirely new, independent grant, as of its date, of place lands to the extent of ten full sections in width on each side of the particular road therein mentioned, with indemnity limits of twenty miles. It is, in legal effect, as was substantially decided by this court in 1879, in the Madison-Portage case, a grant of four additional sections in width of place lands, with indemnity limits enlarged from fifteen to twenty miles, and a confirmation of the previous grant of six sections in width, with fifteen miles indemnity limits. It converted four miles of indemnity limits,
143 as defined in the act of 1856, into place limits of the road to Bayfield, and added five miles on each side of the place limits thus enlarged to the indemnity limits; but it left untouched the grant, made in 1856 for the same line of road, of six sections in width on each side, with indemnity limits of fifteen miles. This view is fortified by the explicit recognition, in the first section of the

act of 1864, of the fact that the additional lands therein granted are for the "same purpose" as were the lands originally granted by the act of 1856, which the act of 1864 required to be "deducted" from the aggregate of ten sections in width on each side of the road, thereafter to constitute the place limits of the Bayfield branch. The first section of the act of 1864 should receive the same construction that would be given if it had in words added four sections in width to the place limits and five miles to the indemnity limits on each side of the road. The result, according to this view, is that (except as to that part of the indemnity lands converted by the first section of the act of 1864 into place lands of the Bayfield road) the order of the Secretary, made prior to that year, withdrawing from sale and location for the benefit of that road its entire indemnity lands was not abrogated or annulled by that act. So far from Congress intending to deprive the Bayfield road of any part of its original indemnity lands, it put a part of them in its place limits and increased its indemnity limits by five miles.

If this interpretation of the first section of the act of 1864 should be wrong, and if that section should be construed as making an entirely new, independent grant, as of the date of that act, of
144 ten sections in width, with indemnity limits of twenty miles on each side of the road, the result would be that Congress, by the same act, embraced the lands in dispute within the indemnity limits of the Bayfield road and within the place limits of the Central road; and such we understand to be substantially the position of the plaintiff, for it contends that the act of 1864 superseded and took the place of the act of 1856 in all material respects, "so that the grants of the Omaha Company and of the Central Company were in fact contemporaneous grants." A view somewhat similar was presented at the argument of the case of Madison & Portage Railroad Company *vs.* State of Wisconsin, etc. The court then said: "Although the Wisconsin Central Railroad Company has filed no cross-bill and has only presented its claims by answer, it may not be improper for us to express an opinion upon the effect of the grant by the act of 1864 when there is a conflict or overlapping of lands granted to the different railroads as they approach Lake Superior, large quantities of lands being thus granted by the act to different roads. These grants are made by the same law operating on the lands granted at the same time. The Wisconsin Central railroad has completed its road to Ashland, on Lake Superior, a point not named in the act, but up to the present time no road has been finished to Bayfield or to the west end of Lake Superior, and without foreclosing the parties upon this question we should be inclined to think that the different companies as to all lands overlapping in the respective grants must be considered tenants in common without regard to priority of construction."

The court concedes the force of the suggestion that what appears in the above extract from the opinion in the former case was not absolutely necessary to the determination of any specific
145 issue therein made in respect to which affirmative relief

could have been given. It is now alluded to for the purpose of saying that if the present case depended upon the first and third sections of the act of 1864 without reference to the sixth section there would be ground for holding, in respect to the particular lands in dispute and other lands similarly situated, that the Omaha Company and the Central Company became tenants in common without regard to priority of construction; in which event the agreement between them, the deed of release from the Omaha Company and the patent from the State as to the latter, might, perhaps, be sufficient to sustain the title of the plaintiff as against the defendant; but no question was made in the former case as to the scope of section six of the act of 1864, nor was there any question in that case as to the effect of the withdrawal prior to the act of 1864 from sale or location and for the benefit of the Bayfield road of the lands that are within the outer boundaries of the place limits of the road mentioned in the third section of that act. There was, consequently, no occasion to consider, and the court did not determine in the former case, the question whether the lands here in dispute or any lands similarly situated were excluded from the operation of the act of 1864 in virtue of its sixth section and by reason of the Secretary's previous orders withdrawing them from sale or location.

We proceed now to inquire whether the lands in dispute were in fact granted by the third section of the act of 1864. That section grants to the State to aid in the construction of the road therein mentioned "every alternate section of public land designated by odd numbers for ten sections in width on each side of said road."

And we have seen that the lands in dispute constitute part
146 of some of those odd-numbered sections; but the sixth section expressly reserves and excludes from the operation of the act not only mineral lands, but "any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement or in any manner for any purpose whatsoever." If, when the act of 1864 was passed, those lands were "reserved to the United States * * * in any manner for any purpose whatsoever," then they were expressly excluded from the operation of the act, and therefore were not granted. Were they not so reserved by the order of the Secretary of the Interior, which had not been modified or rescinded by him when the act of 1864 was passed? The plaintiff insists that, while they may have been regarded as reserved for the benefit of a particular road, they were not, within the meaning of the act, reserved "to the United States." This position cannot be sustained in view of the decisions of the Supreme Court of the United States.

The lands embraced in the withdrawals, although held as indemnity lands, belonged to the United States. It had never parted with its interest in them nor lost its right to control them absolutely. Its title to them was complete because (as shown by adjudged cases to be hereafter cited on another point), although withdrawn from sale or location in order that losses when ascertained in the place limits of the Bayfield road might be supplied by selections from them, the title, the right of property of the United States remained unaffected

until such selections were actually made and approved. They were, it is true, selected in mass by the State's agent after the map of definite location of the Bayfield road was filed and approved; but such general selection did not change the right of property, for no particular lands were set apart to supply any ascertained losses in place
147 limits. The reservation of them was solely to the end that the United States might at the proper time use them in meeting its obligations on account of the Bayfield road. In every sense, therefore, they were by competent authority "reserved to the United States"—that is, retained by the United States as lands not granted, and therefore as its property. The withdrawal of them from sale or location under the general laws providing for the administration of the public domain was a reservation of them by and to the United States, and that their condition when the act of 1864 was passed.

Here we are met with the inquiry whether Congress could have intended in respect to the road mentioned in the third section of the act of 1864 to make to the State a grant that would cover these lands and by the sixth section of the same act exclude them altogether from the grant. This is hardly an accurate or full statement of the case. The question as propounded assumes the very matter to be decided. It assumes that Congress intended at all events by the third section of the act of 1864 to grant these lands and other lands similarly situated as place lands of the road mentioned and to become, as of the date of the grant, the property of the company constructing that road when its route was finally located. Such assumption might be justified if we looked alone to the third section. We cannot, however, in constructing the act ignore the first and sixth sections. The entire act must be taken together and in connection with the act of 1856 in order to ascertain the will of Congress. Looking at the sixth section of the act of 1864 in connection with the third, it is clear that the words of the latter section are subject to the express condition contained in the former,
148 that the grant shall not include any land "reserved to the United States * * * in any manner for any purpose whatsoever." The sixth section should receive the same construction precisely that would be given if it had been simply a proviso of the third section. It is as if Congress had declared in words, "We give to the State for the benefit of the road to be constructed from Portage City, Berlin, Doty's Island, or Fond du Lac, in a northwestern direction, to Bayfield, thence to Superior, on Lake Superior, every alternate section of public land designated by odd numbers for ten miles — sections in width on each side of the road except or excluding such lands within those limits as are reserved to the United States in any manner for any purpose whatsoever."

This construction, it is contended, cannot be sound, as it would deprive even the road mentioned in the first section of the act of 1864—the Bayfield branch—of the benefit of all the lands withdrawn from sale or location by the Secretary's order, and this for the reason that the broad language of the sixth section of the act of 1864 embraces every road in that act mentioned. Not at all; for,

as heretofore shown, the lands in dispute constituted a part of the indemnity lands of the Bayfield road under the act of 1856, the general purposes, terms, and conditions of which are recognized by the act of 1864. Whatever rights that road had in respect to those particular lands arose under the act of 1856 and did not come from what may be regarded as the new grant in the act of 1864 giving additional place lands, with enlarged indemnity limits; but even were it true that the grant in the act of 1856 for the Bayfield road was a new grant as to all of the lands within the place
149 limits of that road as enlarged by the act of 1864, the result would be the same; for, in the case supposed, there would be ground to hold that the sixth section excluded the lands in dispute from the act of 1864, in which event, so far as the Omaha and Central companies were concerned, they would have been regarded as "reserved to the United States," and therefore excluded altogether from the operation of the act.

We think that some confusion has come into this case by reason of the fact that the grant for the Central road is in the same act that enlarges the grant made for the Bayfield road in 1856. Let us suppose that the act of 1864 had made no reference whatever to the act of 1856 and had contained only a grant to the State, in the words of the third section of the former act, accompanied by a distinct clause or section reserving and excluding from the operation of the act any and all lands "reserved to the United States," either by an act of Congress or in any other manner for any purpose whatsoever. Would it be pretended that such an act granted to the State the lands previously included in the indemnity limits of another road, whose route had then been definitely located and whose indemnity lands had been withdrawn and reserved from sale or location by the Secretary of the Interior in order to supply deficiencies, if any were found to exist, in the place limits of that other road? We think not; and yet there is really no difference in law between the case supposed and the case now before us.

That we have not given undue weight to the Secretary's order of withdrawal or misinterpreted it is abundantly established by decisions of the Supreme Court in cases somewhat similar to the present one. These decisions, whatever might be the view of
150 this court as to the meaning of the words "reserved to the United States," if the question were for the first time presented for determination, leave no room for doubt as to our duty in the present case. In 1846 Congress, "for the purpose of aiding the Territory of Iowa to improve the navigation of the Des Moines river from its mouth to the Raccoon fork (so called)," made a grant to that Territory of "one equal moiety in alternate sections of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States." 9 Stat., c. 103, sec. 1. The Des Moines river rises in the northern part of Iowa and empties into the Mississippi at the southeast corner of that State.

The Raccoon fork, coming from the northwest, enters the Des Moines river many miles above the mouth of that river, near the center of the State. Subsequently, on the 15th of May, 1856, Congress granted to the State of Iowa, for the purpose of aiding in the construction of certain railroads within its limits, every alternate section of land designated by odd numbers for six sections in width on each side of each of said roads, with a proviso substantially in the words of the sixth section of the act of May 5, 1864, now before us. That proviso (the italics are ours) was in these words: "That any and all lands heretofore *reserved to the United States* by any act of Congress or *in any other manner by competent authority*, for the purpose of aiding in any objects of internal improvements, *or for any purpose whatsoever*, be, and the same *is* hereby, reserved from the operation of this act, except so far as it may be found neces-
151 sary to locate the routes of the said railroads through such reserved lands, in which case the right of way shall be granted, subject to the approval of the President." 11 Stat., 9, c. 28, sec. 1. In Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 How., 66, it was decided that the grant of 1846 did not include lands above Raccoon fork—that is, lands north and west of its junction with the Des Moines river, but only lands within the prescribed distance from the river below such junction. In Wolcott *vs.* Des Moines Co., 9 Wall, 681, which involved the title to certain lands covered by the above grant of 1846, it appeared that in August, 1859, the Des Moines Navigation Company, to which the State succeeding to the rights of the Territory had, in May, 1858, transferred the land granted to the Territory, conveyed to Wolcott a half section within five miles of Des Moines river, but situated above the junction of Raccoon fork with that river, and warranted the title. At the date of the passage of the act of May 15th, 1856, the odd-numbered sections within five miles of Des Moines river, above the point where the Raccoon fork empties into it, had been reserved, not in terms "to the United States," but from sale, by the proper officer having charge of the public lands. That reservation was made in the belief, shared by many public officers, that the grant of 1846 included the odd-numbered sections above as well *as well* as those below that fork within the prescribed distance from the river. The question presented was as to the scope and effect of the proviso in the act of 1856. It was admitted that the grant to Iowa by the act of May 15, 1856, for the benefit of the railroads named in it, embraced the lands there in dispute unless they were excluded by the above proviso. This court said: "We think it difficult to resist the conclusion that Con-
152 gress in the passage of the proviso had specially in their minds this previous grant and the conflict of the opinion concerning it and intended to reserve the land for further disposition if the title under the first grant should turn out to be defective. The decision of this court had not then taken place, though the litigation was probably pending in the court below, in the district of Iowa. The words of the proviso point almost directly to this grant and to the dispute arising out of it among the public authorities—'all lands heretofore reserved,' &c., 'by any act of Congress or in any

other manner by competent authority for the purpose of aiding in any objects of internal improvements,' &c. These improvements of the Des Moines river were then in progress. Now, if it had turned out that the true construction of the act carried the grant above the Raccoon fork, then the lands would have been reserved by the act of Congress and no further legislation necessary; but, not satisfied with this, as if to provide for any result in respect to the title to them if reserved in any other manner by competent authority for the object of internal improvements, then the enacting clause should not operate to carry them under the new grant.

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river first by the Secretary of the Treasury, when the Land Department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department under instructions from the President and cabinet. Besides, if this power was not competent, which we think it was ever since the es-
153 tablishment of the Land Department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it by necessary implication, not only the power, but the duty of the Land Office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by Congress for any of those public purposes to a State, notice is given by the Commissioner of the Land Office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made in 1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

These observations are pertinent to the case in hand. What was said in that case by the Supreme Court of the United States bears directly upon the inquiry whether the reservation by the Secretary of the Interior from sale or location of the lands within the indemnity limits of the Bayfield road was not a reservation "to the United States." In the Wolcott case the withdrawal of lands from sale or location was distinctly characterized as a reservation of that class. The decision fully sustains the view that the lands embraced by the Secretary's order of withdrawal in the present case were "reserved to the United States." It is peculiarly strong in its application to the case before us by reason of the fact that the lands "reserved" in the Iowa case
154 were not in fact embraced by Congress in the grant of 1846, and consequently could not rightfully be used for the purposes for which they were withdrawn. The decision in Wolcott *vs.* Des Moines Navigation Company was approved and followed in many subsequent cases. Homestead Company *vs.* Valley Railroad,

17 Wall., 153; Wolsey *vs.* Chapman, 101 U. S., 755; Litchfield *vs.* County of Webster, 101 U. S., 773; Dubuque, &c., R. R. *vs.* D. M. V. R. R. Co., 109 U. S., 329. See also Williams *vs.* Baker, 17 Wall., 144, and Bullard *vs.* Des Moines, &c., 122 U. S., 167. In our judgment these cases control the decision of the present case, so far as it depends upon the question whether the lands in dispute were "reserved to the United States" when the act of 1864 was passed. If the lands involved in the Wolcott case were, within the meaning of the act of May 15, 1856, "reserved to the United States" for the purposes of the grant to Iowa in 1846, although they were not in fact embraced by that grant and could not be used in executing it, much more would it be held that the lands within the original indemnity limits of the Bayfield road reserved by the Secretary's order of withdrawal were, within the meaning of the sixth section of the act of 1864, "reserved to the United States."

Another contention upon the part of the plaintiff is that, even conceding that the lands in dispute were reserved by virtue of their being withdrawn prior to 1864 for indemnity purposes, yet as the object for which the withdrawal was made, namely, to supply deficiencies in the place limits of the Bayfield road, *were* fully satisfied (before the defendant made his entry) by the final adjustment of the land grant for the Omaha road, the lands so withdrawn would be affected by the granting clause in the third section of the
155 act and so become and be the property of the Central Company under that section. This view is in opposition to many adjudged cases. Whatever force it might have in the case of two contemporaneous grants to different companies covering the same land, in neither of which an exception was made of lands "reserved to the United States," it can have no application where, as in the present case, the statute expressly reserves and excludes from its operation any and all lands so reserved. If these lands were reserved when the act of 1864 was passed, they certainly were not granted by the third section of that act to the Central road, and could not get into the grant to and become the property of the Central Company by reason simply of their not being required for the adjustment of a different grant made for another road. This view is illustrated by several cases. In Kansas Pacific R. W. Co. *vs.* Dunmeyer, 113 U. S., 629, the question was whether lands to which a claim of homestead "attached" after the passage of an act granting lands to a railroad company, but before its line was definitely located, reverted to the company and became a part of its grant by reason of the failure of the homesteader to perfect his claim in the mode required by law. It was held that they did not, for the reason that the grant to the railroad company was of lands within certain prescribed limits as to quantity and location "not sold, reserved, or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely located." It was adjudged that the lands to which the homestead claim had attached could not be included in the grant to the railroad company. The court said: "No attempt has ever been made to include lands reserved

to the United States, which reservation afterwards ceased to exist, within the grant, though this road and others,
156 with grants in similar language, have more than once passed through military reservations for forts and other purposes which have been given up or abandoned as such reservations and were of great value; nor is it understood that in any case where lands had been otherwise disposed — their reversion to the Government brought them within the grant. Why should a different construction apply to lands to which a homestead or pre-emption right has attached? Did Congress intend to say that the right of the company also attached, and whichever proved to be the better right should obtain the land? * * * The reasonable purpose of the Government undoubtedly is that which is expressed, namely, while we are giving liberally to the railroad company we do not give any lands we have already sold or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. * * * It necessarily means that if such rights have attached they (the lands) are not granted." So in Bullard *vs.* Des Moines Railroad, 122 U. S., 167, 176: "The object of the bill is to have a declaration of the court that the title of the plaintiff under these settlements and pre-emptions is superior to the title conferred by Congress on the State of Iowa and her grantee under the act of July 12, 1862. If the lands at the time of these settlements and pre-emption declarations were effectually withdrawn from settlement, sale, or pre-emption by orders of the department, which we have considered, there is an end to the plaintiff's title, for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the act of 1862, and no title could be established, because the Land Department had no right to grant it." In Hastings,
157 &c., R. R. Co., *vs.* Whitney, 132 U. S., 357, the contest was between a railroad company claiming under a grant of lands made in 1866 to the State of Minnesota similar to the one involved in the Dunmeyer case. Before the passage of the act, namely, in 1865, one Turner took certain preliminary steps under the homestead laws of the United States for the entry of the lands there in dispute. The entry made by him was, however, cancelled in 1872, and in 1877 the same lands were entered by Mrs. Whitney as a homestead. The grant of 1866 excepted lands to which a right of homestead or pre-emption "had attached." The claim of the railroad depended upon the question whether the lands came into the grant of 1866 upon the cancellation in 1872 of the entry made by Turner in 1865. It was held that Turner's entry, not being void upon its face, operated to exclude the land from the railroad grant, and that upon the cancellation of such entry the tract in question did not enure to the benefit of the company, but reverted to the Government and became a part of the public domain, subject to appropriation by the first legal applicant. These cases are, in the judgment of this court, conclusive against the contention that the lands here in dispute became part of the place lands of the Central road after the grant for the benefit of the other road had been

finally adjusted with the Omaha Company and satisfied with other lands.

It remains to consider the claim of the plaintiff based upon the agreement between it and the Omaha Company and the deed of release by the former to the latter company. Although the lands in dispute were withdrawn from sale or location for the benefit of the Bayfield branch of the Omaha Company, and although the orders of withdrawal were in force at the date of the execution of the above agreement and deed of release, we cannot see that the Omaha
158 Company had any legal interest in these lands which, at the date of that agreement and deed, could have been transferred by it to the Central Company. When the agreement and deed were made the lands in dispute had not been specially selected and set apart for the purpose of supplying deficiences in the place limits of the Bayfield road. Until so selected and set apart with the approval of the Land Department they remained, in the fullest legal sense, the property of the United States. In Barney *vs.* Winona & C. R. R. Co., 117 U. S., 228, 232, the court said: "In the construction of land-grant acts in aid of railroads there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes and the title to which accrues only from the time of their selection." So in Sioux City &c., Railroad Co. *vs.* Chicago, &c., Railroad, 117 U. S., 406, 408: "No title to indemnity lands was vested until a selection was made, by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior." The same view was recently expressed in Wisconsin Railroad Company *vs.* Price County, 133 U. S., 496, 513, where one of the questions was as to the right of the State of Wisconsin to tax as against a railroad company certain lands within indemnity limits that had been selected and reported to the Secretary of the Interior to be taken in lieu of lands lost in the company's place limits; but at the time the tax was assessed that officer
159 had not approved such selection. It was held that the approval of the Secretary was essential to the efficiency of the selections and to give to the company any title to the lands selected. After observing that his action was judicial, not ministerial, the court said: "He (the Secretary) was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits have been previously disposed of by the Government or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss

was established. * * * Until the selections were approved there were no selections in fact—only preliminary proceedings taken for that purpose—and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned; but such promise passed no title, and, until it was executed, created no legal interest which could be enforced by the courts."

It results from these cases that the agreement between the Omaha Company and the Central Company, that the lands in dispute should, as between those companies, belong to the latter corporation,
160 had no effect whatever upon the title or right of property of the United States. If at that time the lands had been actually set apart for the Bayfield road by approved selections to supply ascertained deficiencies in the place limits of that road, a different question would have been presented for determination.

It was stated at the bar that the decision of this case and of two other cases in ejectment, tried at the same time and depending upon the same facts, would indirectly affect the title to large tracts of land in the same situation as the particular lands here in dispute and which have been heretofore sold in good faith by the Central Company to *bona fide* purchasers in the belief that they were embraced in the grant contained in the third section of the act of May 5, 1864, and not excluded from the operation of that act by the sixth section relating to lands reserved to the United States, and that a decision in favor of the defendant in the present case would produce great confusion and trouble among such purchasers. In view of this statement the court has felt it to be its duty to embody in this opinion all the material facts shown in evidence and to state fully the grounds upon which its conclusion rests. That conclusion is:

That the lands in dispute were not granted by the United States for the benefit of the road mentioned in the third section of the act of May 5, 1864, and that the grant for the benefit of the railroad beginning at a point on the line from the St. Croix river or lake to the west end of Lake Superior and extending to Bayfield, described in the first section of that act, having been fully adjusted by the United States with the only company that was entitled to the benefit of such last-named grant, the lands in dispute became a
161 part of the public domain in virtue of the orders subsequently made by the Secretary of the Interior and were thereafter open to entry under the homestead and pre-emption laws of the United States.

It is ordered that the verdict heretofore returned by the jury in this case be set aside and a new trial be awarded.

Judge Bunn authorizes me to announce his concurrence in the views herein expressed.

JOHN M. HARLAN,
Circuit Justice.

162 [Endorsed:] United States circuit court, western district of Wisconsin. Wisconsin Central R. R. Co. *vs.* W. O. Forsythe. Certified copy of opinion.

163 Supreme Court of the United States.

THE WISCONSIN CENTRAL RAILROAD COMPANY, Plaintiff in Error,
vs.
WILLIAM O. FORSYTHE, Defendant in Error.

And afterwards, to wit, on the 25th day of July, A. D. 1891, comes the said Wisconsin Central Railroad Company, by S. U. Pinney, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

I. That the said circuit court erred in refusing to direct the jury to find a verdict in favor of the said plaintiff, as requested by it, and against the said defendant.

II. That the said circuit court erred in directing the jury to find a verdict in favor of the defendant, William O. Forsythe, and against said plaintiff.

And the said Wisconsin Central Railroad Company prays that the judgment aforesaid may be reversed, annulled, & altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

S. U. PINNEY,
Attorney for Pl'ff in Error.

Endorsed on cover: Case No. 14,754. W. Wisconsin C. C. U. S. No. 1280. The Wisconsin Central Railroad Company, plaintiff in error, *vs.* William O. Forsythe. Filed July 20, 1891.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 238.

THE WISCONSIN CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,
v.
WILLIAM O. FORSYTHE.

BRIEF FOR PLAINTIFF IN ERROR.

EDWIN H. ABBOT,
LOUIS D. BRANDEIS,
HOWARD MORRIS,
WILLIAM H. DUNBAR,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1894.

THE WISCONSIN CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

WILLIAM O. FORSYTHE.

BRIEF FOR PLAINTIFF IN ERROR.

INTRODUCTORY STATEMENT.

This action was brought on April 5, 1890, by the Wisconsin Central Railroad Company against William O. Forsythe, in the Circuit Court of the United States for the Western District of Wisconsin, to recover possession of one hundred and sixty acres of land, comprising the southwest quarter of section 11, township 47 north, of range 4 west, in Ashland county, Wisconsin, and damages for unlawful withholding of possession. The land is situated about half a mile south of the city of Ashland, and between the lines of the Bayfield branch of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company (hereinafter called the Omaha), and the Wisconsin Central Railroad Company (hereinafter called the Central). It is less than a mile distant westerly from the latter, and between ten and fifteen miles easterly from the former. The land is covered with timber, and worth about fifty dollars an acre.

The plaintiff claims title to the land under the railroad grant from the United States to the State of Wisconsin, contained in the third section of the act of May 5, 1864, 13 Stat. 66, and under a release from the Omaha Company. The Central Company became entitled to the grant for the route from the central portion of the State to Bayfield described in section 3 of the act of May 5, 1864. It was constructed in compliance with the terms of that act, and completed in June, 1877. The land is within the place limits of that grant, and was patented by the State to the plaintiff.

The defendant denies the plaintiff's title, contending that the land was not included in the grant made by the act of 1864, that it was then reserved to satisfy possible indemnity selections under an earlier act of June 3, 1856, 11 Stat. 20, for the benefit of what is now the Bayfield branch of the Omaha road, and had for that reason been withdrawn from entry and sale.

The act of June 3, 1856, 11 Stat. 20, granted land to the State of Wisconsin to aid in the construction of a railroad, part of which was to run from St. Croix lake or river to the west end of Lake Superior and to Bayfield. The grant was of every alternate section designated by odd numbers for six sections in width on each side of the road, with a right to make indemnity selections within fifteen miles on each side. The act of May 5, 1864, 13 Stat. 66, made a grant of ten miles in place, with twenty miles indemnity limits for a road between the same termini, besides a like grant for the new Central route above referred to. A map of definite location of the Bayfield branch of the Omaha road was filed prior to the act of 1864, and was again adopted after that act, but the branch was not built until 1881.

The two roads converge in approaching Ashland, so that the limits of their respective land grants overlap. The land in question in this suit lies within this overlap; it is a part of the granted or place lands of the Central road, and within the indemnity limits fixed for the Bayfield branch of the Omaha road under the act of June 3, 1856, as well as those fixed under the act of May 5, 1864. The land was never selected by the Omaha Company, and all claim of a right to such selection was, by the release referred to, surrendered to the plaintiff. There is, consequently, no dispute between the two companies, or between either of them and the State of Wisconsin. The officers of the Land Department, however, refused to recognize the plaintiff's title, and in January, 1890, threw the land open to sale and entry, and permitted the defendant to enter it.

The only question at issue is whether the plaintiff is entitled to the land, or whether the United States, in spite of having included the land in two grants to the State to aid railroads each of which was built so as to earn its grant, still remained entitled to the land. This question depends upon the construction and effect of the acts of June 3, 1856, and May 5, 1864, and of the proceedings taken by the Land Department.

Statement of Facts.

By the act of June 3, 1856, 11 Stat. 20, the United States granted land to the State of Wisconsin to aid in the construction of two lines of railroad; the westerly line from Madison or Columbus *via* Portage City to the St. Croix river or lake, and thence to the west end of Lake Superior, including a branch to Bayfield; the easterly line from Fond du Lac on Lake Winnebago northerly to the state line.

The provisions of this act material to the question at issue are as follows: —

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, that there be, and is hereby granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by the way of Portage City to the St. Croix River or Lake between townships twenty five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purpose aforesaid: PROVIDED, That the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: PROVIDED FURTHER, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: AND PROVIDED FURTHER, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route

of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Sec. 2. And be it Further Enacted, That the sections and parts of sections of lands which, by such grant shall remain to the United States, within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

Sec. 3. And be it Further Enacted, That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the government of the United States free from toll or other charge upon the transportation of property or troops of the United States.

Sec. 4. And be it Further Enacted, That the lands hereby granted to said State shall be disposed of by said State, only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.

The act of June 3, 1856, was accepted by the State of Wisconsin on October 8, 1856 (Laws of Wis. 1856, c. 118); and on October 11, 1856, the State of Wisconsin (Laws of Wis. 1856, c. 122) conferred the benefit of the land grant therein contained upon the LaCrosse & Milwaukee Railroad Company (Record, p. 9). In pursuance of the Laws of Wisconsin, 1856, c. 122, and 1857, c. 230, the St. Croix & Lake Superior Railroad Company became entitled to the

benefit of this land grant to aid in the construction of the contemplated road from St. Croix river or lake to the west end of Lake Superior and to Bayfield (Record, pp. 9, 11).

On May 29, 1856 (the act of June 3, 1856, having then been passed by both houses of Congress and sent to the President for his approval), the Commissioner of the General Land Office telegraphed to the respective registers and receivers of the land offices at Hudson, Mineral Point, Menasha, Stevens Point, and Superior to suspend all sales and location of lands in their respective districts until further orders. On June 12, 1856, the Commissioner by letter directed the same officials to continue this withdrawal. On October 26, 1856, the Commissioner directed the officials at Superior City, Hudson, and Eau Clair, upon the filing in their respective offices of a duly certified map of the line of route as definitely fixed of any road referred to in the act of June 3, 1856, to cease to permit locations by entry or preemption, or for any purpose whatever, of the land within fifteen miles of such route (Record, pp. 18–20).

The St. Croix & Lake Superior Railroad Company filed in the Department of the Interior, on March 2, 1858, the map of definite location of the road extending from the St. Croix river or lake to the west end of Lake Superior, and on July 17, 1858, filed the map of definite location of the branch road to Bayfield (Record, p. 19). On March 1, 1859, the Commissioner of the General Land Office forwarded to the register and receiver of the land office at Hudson, Wis., a diagram of the lands there for sale, showing the six and fifteen miles limits of these locations, and directed them to continue to reserve all vacant tracts outside the six

and within the fifteen miles limits from sale or location for any purpose whatever (Record, p. 20).

Prior to May 5, 1864, the only part of the westerly line of road provided for in the act of 1856 which had been constructed was about sixty-one miles between Portage and Tomah, built in the spring of 1858 (Record, p. 191). The land grant contained in that act having thus proved wholly inadequate to induce the building of the contemplated road, Congress passed the act of May 5, 1864, 13 Stat. 66. By this act, the unbuilt portion of the contemplated line of railroad from Portage to the west end of Lake Superior was divided at the St. Croix river into two parts, for each of which an increased grant was made; in addition, the act made a grant of like amount for a new route to Lake Superior, running through the central part of the state.

The provisions of the act in full are as follows: —

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and is hereby granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by the act of congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or

agents, to be appointed by said company, to select, subject to the approval of the Secretary of the Interior from the public lands of the United States nearest to the tier of sections above specified as much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by said state for the use and purpose aforesaid: PROVIDED, That the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six should any such deficiency exist.

SEC. 2. AND BE IT FURTHER ENACTED, That there be and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from the town of Tomah in the county of Monroe, in said state, to the St. Croix river or lake, between townships twenty-five and thirty-one every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by the act of congress granting lands to said state to aid in the construction of certain railroads, approved June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the said act of June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections, or parts of sections, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents to be appointed by said state to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States nearest to the tier of sections above specified, as much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appro-

priated, or to which the right of pre-emption or homestead has attached, as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections, designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state for the use and purpose aforesaid: PROVIDED, That the lands to be so located shall in no case be further than twenty miles from the line of the said road, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selections and locations may be made for the benefit of said state, and for the purpose aforesaid to supply any deficiency under the said grant of June three, eighteen hundred and fifty-six, should any such deficiency exist.

SEC. 3. AND BE IT FURTHER ENACTED, That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said state may determine, in a northwestern direction to Bayfield, and thence to Superior on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said state to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, that it shall be lawful for any agent or agents of said state, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much public land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which the right of pre-emption or homestead has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state, or by the company to which she may transfer the same, for the use

and purpose aforesaid: PROVIDED, that the lands to be so located shall in no case be further than twenty miles from the line of said road.

Sec. 4. AND BE IT FURTHER ENACTED, That the sections and parts of sections of lands which shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of the said reserved lands become subject to private entry until the same have been first offered at public sale at the increased price.

Sec. 5. AND BE IT FURTHER ENACTED, That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six, be and the same is hereby extended to a period of five years from and after the passage of this act.

Sec. 6. AND BE IT FURTHER ENACTED, That any and all lands reserved to the United States by any act of congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Sec. 7. AND BE IT FURTHER ENACTED, That whenever the companies to which this grant is made, or to which the same may be transferred shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering-places, depots, equipments, furniture, and all other appurtenances of a first class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed and co-terminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: PROVIDED HOWEVER, that no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty

miles begin, and where the same end: which oath shall be taken before a judge of a court of record of the United States.

Sec. 8. And be it Further Enacted, That the said lands hereby granted shall, when patented as provided in section seven of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other, and the said railroads be, and shall remain, public highways for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States.

Sec. 9. And be it Further Enacted, That if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this act, as provided herein, no further patents shall be issued to said company for said lands, and no further sales shall be made, and the lands unsold shall revert to the United States.

The State of Wisconsin duly accepted this act, and the benefit of the grant contained in the first section was duly conferred by the State upon the St. Croix & Lake Superior Railroad Company (Record, pp. 17, 22), which, on April 22, 1865, adopted as the definite location for the Bayfield branch, the location filed on July 17, 1858, under the act of June 3, 1856 (Record, p. 22).

On February 28, 1866, the Commissioner of the General Land Office transmitted to the registers and receivers of the several land offices above referred to a diagram showing the limits of the grants contained in the first section of the act of May 5, 1864, and directed the lands within those limits to be withdrawn (Record, pp. 20, 21).

No part of the road from St. Croix river or lake to Lake Superior, or of the branch to Bayfield, was constructed by the St. Croix & Lake Superior Railroad Company (Record, p. 22). The grants to it were repealed (Laws of Wis. 1869, c. 90; 1872, c. 89), and in 1874 the State granted to the North Wisconsin Railway Company the benefit of the

grants contained in the act of June 3, 1856, and in the first section of the act of May 5, 1864 (Record, pp. 17, 23). This grant from the State subsequently, by consolidation, became vested in the Omaha Company (Record, p. 18).

The benefit of the grant contained in the third section of the act of May 5, 1864, became vested in the Portage, Winnebago & Lake Superior Railroad Company, in pursuance of Laws of Wisconsin, 1866, c. 314; 1866, c. 362; 1869, c. 257 (Record, pp. 23, 26, 29), and on February 4, 1871, its name was changed to the Wisconsin Central Railroad Company (Record, p. 30). By joint resolution of June 21, 1866, 14 Stat. 360, Congress approved the route fixed by the State of Wisconsin in the act of 1866, c. 314, above referred to, and authorized the selection and application of lands under the land grant in the third section of the act of May 5, 1864, for and to that line. By act of April 9, 1874, 18 Stat. 28, the time for completing the whole road was extended until December 31, 1876.

The map of definite location of this route was duly filed, and on December 10, 1869, the Commissioner of the General Land Office, by letter to the receiver and register at Bayfield, Wis., enclosing a diagram showing the limits of the land grant, directed the withdrawal of the lands included within those limits (Record, p. 31). The plaintiff completed the first section of its road south of Ashland, Wis., by October 19, 1873. The land in dispute is co-terminous with this section (Record, p. 32).

As they approach the city of Ashland, the main line of the Central Company and the Bayfield branch of the Omaha Company converge so that the land grants appurtenant to them overlap. The land in dispute is situated near

the city. It is distant between ten and fifteen miles [within the indemnity limits] from the Bayfield branch of the Omaha road, as located under the acts of June 3, 1856, and of May 5, 1864, and is also within the ten miles [place] limits of the grant for the plaintiff's road (Record, p. 33). Controversies having arisen between the Omaha Company and the Central Company in consequence of the overlapping of their grants, they entered into an agreement, dated February 12, 1884, for the purpose of settling all matters in dispute (Record, p. 77). By this agreement it was provided, among other things (section xii.):

> "The Omaha Company consents that the Central Company [plaintiff] shall take patents for all the lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly ten-mile limit of the Central Company, and agrees to assist the Central Company to get such patents from the State of Wisconsin" (Record, p. 79).

The lands thus described in the section quoted include the land in dispute.

On February 25, 1884, the State of Wisconsin granted to the plaintiff a patent for a large quantity of land co-terminous with the parts of the road constructed upon which the land grant had been earned, including the land in dispute (Record, p. 75). On February 19, 1887, the Omaha Company executed a further instrument of release to the plaintiff, by which it surrendered and waived all right of whatsoever nature to claim or select any lands lying within the overlapping limits of the two land grants east of a line therein described, so drawn as to include in the lands released the land here in dispute. This instrument stated the intent of the Omaha Company to surrender to the plaintiff all lands in

the overlapping limits described as in section xii. of the indenture above referred to, and that the Omaha Company consented that those lands should be conveyed by the United States to the state of Wisconsin for the benefit of the plaintiff (Record, p. 79). On July 2, 1887, the plaintiff filed in the Land Office lists of lands (including the land in dispute) which were within the ten miles limit of its grant but overlapped the indemnity limits of the act of 1856 to the Omaha Company claiming the lands as part of its grant. The Commissioner rejected and cancelled these lists, on the ground that the plaintiff had no title to the lands, and, on appeal, the Secretary of the Interior, on January 24, 1890, affirmed this decision (Record, p. 58). Soon afterwards the defendant took proceedings to enter the lands, and on April 5, 1890, the plaintiff brought this suit.

The plaintiff claims the land as part of the place lands granted to it by the act of May 5, 1864. It derives its title direct from the act of Congress and the patent of the State of Wisconsin, and relies collaterally upon the release from the Omaha Company. The defendant by his answer denies the plaintiff's title, contending that the land was excluded from the grant made in the third section of the act of May 5, 1864, on the ground that, when that act was passed, the land was reserved to the United States. In support of this contention the defendant relies upon the fact that the Land was within the indemnity limits of the grant made by the act of June 3, 1856, and that prior to May 5, 1864, the Land Department had directed all land within those limits to be reserved from sale and entry in order to satisfy the prior grant. The defendant also set up as a defence that the plaintiff had taken proceedings in the Land Office to

obtain a patent to this land, and that the Commissioner of the General Land Office, and, on appeal, the Secretary of the Interior, had denied the plaintiff's title and right to a patent; and that the plaintiff acquiesced in this decision between the time it was given on January 24, 1890, and the bringing of this suit on April 5, 1890.

The action was tried before a jury, and by direction of the court a verdict was found for the plaintiff; a motion for a new trial was allowed, and upon the second trial the jury, by direction of the court, found for the defendant, and returned the value of the land as eight thousand dollars; final judgment on the merits was thereupon rendered for the defendant. The plaintiff duly excepted to the ruling and instruction; a bill of exceptions was duly allowed setting forth the foregoing facts and the substance of all the evidence introduced at the trial; and the plaintiff duly sued out this writ of error.

ASSIGNMENT OF ERRORS.

The court below erred —

1. In holding that the land in question was not granted by the United States for the benefit of the road provided for in the third section of the act of May 5, 1864;
2. In holding that the plaintiff in error was not on January 12, 1890, entitled to the land in question as a part of the land granted to aid in the construction of its road;
3. In holding that the plaintiff in error was not entitled to recover possession of the land in question from the defendant in error;
4. In setting aside the verdict rendered by the jury at the first trial of the case and granting a new trial;
5. In directing a verdict for the defendant at the second trial of the case.

SYNOPSIS OF ARGUMENT.

A.

The land in dispute was granted to the State of Wisconsin by the third section of the act of May 5, 1864.

I.

The land was clearly included in that grant, unless it was then land reserved to the United States.

1. The land in dispute was public land, and subject to the disposition of Congress, notwithstanding its inclusion in the indemnity limits of the prior grant of June 3, 1856.

   Barney v. *Winona & St. Peter Railroad Co.*, 117 U.S. 228, 232.
   Ryan v. *Railroad Co.*, 99 U.S. 382.
   Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496, 509.
   St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720, 732.
   United States v. *Missouri &c. Railway Co.* 141 U.S. 358, 375.
   Kansas Pacific Railroad Co. v. *Atchison &c. Railroad Co.*, 112 U.S. 414, 421.

2. The fact that this land was within the indemnity limits of the contemporaneous grant made by the first section of the act of May 5, 1864, did not

exclude any part of it from the grant made by the third section.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720.

3. The only exception from the act which could be deemed applicable to the premises in dispute was of lands "reserved to the United States."

See Act of May 5, 1864; 13 Stat. 66.

II.

The land was not "reserved to the United States" merely by reason of its falling within the indemnity limits of the act of June 3, 1856.

United States v. *Colton Marble & Lime Co.*

United States v. *Southern Pacific Railroad Co.*, 146 U.S. 615.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720.

III.

The land in dispute was not reserved to the United States by the action of the Land Department in withdrawing all lands within the indemnity limits of the act of June 3, 1856.

See *Buttz* v. *Northern Pacific Railroad Co.*, 119 U.S. 55, 72.

St. Paul & Pacific Railroad Co. v. *Northern Pacific Railroad Co.*, 139 U.S. 1, 18.

United States v. *McLaughlin*, 127 U.S. 428, 455.

Kansas Pacific Railroad Co. v. *Atchison &c. Railroad Co.*, 112 U.S. 414, 422.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720, 732.
United States v. *Missouri &c. Railway Co.* 141 U.S. 358.

The case of *Wolcott* v. *Des Moines Co.*, 5 Wall. 681, is distinguishable.

IV.

Congress intended to include the land in question in the grant made by section 3 of the act of May 5, 1864, and that intention must prevail.

1. In construing the grant, the intention of Congress, as shown by all the circumstances attending the grant, is decisive.

   Missouri &c. Railway Co. v. *Kansas Pacific Railway Co.*, 97 U.S. 491, 497.
   United States v. *Denver & Rio Grande Railway Co.*, 150 U.S. 1, 14.
   Winona & St. Peter Railroad Co. v. *Barney*, 113 U.S. 618, 625.

2. Congress intended the act of May 5, 1864, to supersede the act of June 3, 1856, as to the railroads provided for by both.
   (*a*) This intention is manifested by the express provisions of the act when considered in connection with the circumstances at the time of its passage.
   (*b*) The scope of the act of 1864 shows that it was meant to govern the entire subject.

   See *King* v. *Cornell*, 106 U.S. 395, 399.

(*c*) The nature of the changes made by the act of 1864 shows that it was deemed to supersede the act of 1856.

(*d*) The similarity of purpose of the two acts shows that the former was not intended to affect the operation of the latter.

Kansas City &c. Railroad Co. v. *Attorney General*, 118 U.S. 682.

3. The act of 1864 itself provided what effect the prior grant should have, and that provision does not exclude these lands from the new grant.
4. The contrary construction of the act would deprive it of much of its effect.
5. The act of 1864 must be construed the same as to the grant in the third section, and as to the grants in first and second sections.

(*a*) This is the necessary result of the language of the act.

(*b*) This was the intention of Congress.

B.

The land in dispute falling within the grant made in section 3 of the act of 1864, the plaintiff is entitled to recover in this action.

I.

The plaintiff shows an exclusive title to the land.

1. The plaintiff's right was superior to that of the Omaha Company.

Missouri &c. Railway Co. v. *Kansas Pacific Railway Co.*, 97 U.S. 491, 500, 501.
St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.* 112 U.S. 720, 727.
Sioux City & St. Paul Railroad Co. v. *Chicago &c. Railway Co.*, 117 U.S. 406.

2. The plaintiff fulfilled the conditions of the grant to it, and thereby acquired a good title against all other persons.

(*a*) The grant vested absolutely upon the completion of the road.

Schulenberg v. *Harriman*, 21 Wall. 44.
Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.
Deseret Salt Co. v. *Tarpey*, 142 U.S. 241.

(*b*) No patent from the United States was necessary.

Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.
Deseret Salt Co. v. *Tarpey*, 142 U.S. 241.
Langdeau v. *Hanes*, 21 Wall. 521, 529.

3. The decision of the officers of the Land Department adverse to the plaintiff is of no effect.

Noble v. *Union River Logging Railroad*, 147 U.S. 165, 175.
Shepley v. *Cowan*, 91 U.S. 330, 340.
Quinby v. *Conlan*, 104 U.S. 420.
Van Wyck v. *Knevals*, 106 U.S. 360.
Doolan v. *Carr*, 125 U.S. 618, 624.
St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720.

II.

The plaintiff can enforce its rights in this action.

The plaintiff can maintain an action at law, although no patent has been issued by the United States.

Van Wyck v. *Knevals*, 106 U.S. 360.
Walden v. *Knevals*, 114 U.S. 373.
Whitney v. *Morrow*, 112 U.S. 693.
Doolan v. *Carr*, 125 U.S. 618.
Grinnell v. *Railroad Co.*, 103 U.S. 739.

ARGUMENT.

The plaintiff seeks in this action to recover land claimed by it to have been granted by the United States to the State of Wisconsin by the act of May 5, 1864, sec. 3, 13 Stat. 66, to aid in the construction of railroads, and by the State granted to the plaintiff. The title set up by the defendant is under an entry by him upon the land, in 1890, as public land open to entry. Neither party holds a patent from the United States. A patent for the premises was issued by the State of Wisconsin to the plaintiff, but the defendant contends that the land, although confessedly within the place limits of the grant from the United States to the State was excluded from the operation thereof because it was then reserved to the United States by virtue of an earlier grant made in the act of June 3, 1856, 11 Stat. 20, for the benefit of what is now the Bayfield branch of the Omaha Railroad, and by virtue of orders from the Commissioner of the General Land Office to the local register and receiver, withdrawing this and other land from entry and sale. This contention rests upon the fact that the land is within the indemnity limits fixed by the act of 1856, and that the Land Department, before the passage of the act of June 3, 1856, directed all land within those limits to be withdrawn from sale and entry, and afterwards continued that withdrawal until the passage of the act of May 5, 1864. The defendant further denies the plaintiff's right to recover, on the ground of alleged acquiescence in a decision of the Secretary of the Interior adverse to the plaintiff's title.

It is submitted that the land was not excluded from the grant made by section 3 of the act of May 5, 1864, either as being within the indemnity limits fixed by the prior grant,

or because of the action of the land department, and that the plaintiff is entitled to recover, notwithstanding the adverse decision of the Secretary of the Interior.

A.

The land in dispute was granted to the State of Wisconsin by the third section of the act of May 5, 1864.

I.

The land was clearly included in that grant, unless it was then land reserved to the United States.

1. The land in dispute was public land and subject to the disposition of Congress.

It is not denied by the defendant that the premises in dispute were, at the time of the grant made by the act of May 5, 1864, a part of the public domain, and at the disposal of Congress except so far as they were affected by the prior grant of June 3, 1856. No other disposition of the land has been alleged, and no adverse rights to it, existing at that time, have been suggested. The act of June 3, 1856, only designated the lands of which the premises in dispute are a part as the source of indemnity selections for deficiencies under that grant. No title to the lands passed from the United States by that designation. They remained a part of the public domain and subject to such disposition as Congress should see fit to make.

"In the construction of land grant acts, in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed

in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. It is these 'granted lands' of the prior grant falling within the six-mile limit that, in our opinion, are reserved, and not the possible indemnity lands which might be subsequently acquired." *Barney* v. *Winona & St. Peter R.R. Co.* 117 U.S. 228, 232.

Until a deficiency of lands within the place limits to satisfy a grant is ascertained, and a selection made of lands to make good such deficiency, the grant as to the indemnity lands is a mere float, conferring no right to any specific parcel of land within those limits.

Ryan v. *Railroad Co.*, 99 U.S. 382.
Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496, 509.

This right of selection is by no means inconsistent with the right of the government to sell the lands.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720, 732.

The United States, in short, does not by such a grant part with its title or with its power or right of disposal over the lands. As to such lands it is a settled principle that—

"title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes." *United States* v. *Missouri &c. Railway Co.*, 141 U.S. 358, 375.

Until selection is made, the title remains in the government "subject to its disposal at its pleasure."

Kansas Pacific Railroad Co. v. *Atchison &c. Railroad Co.*, 112 U. S. 414, 421.

2. The contemporaneous grant by the United States in the first section of the act of May 5, 1864, did not exclude any part of this land from the grant made by the third section.

The land was within the indemnity limits of the grant made by the first section of the act, and within the place limits of the grant under the third section of the act.

Where separate grants made in the same act overlap each other, no part of the place lands under the one grant can be taken as indemnity lands under the other grant. A perfect title is acquired to the lands within the place limits of the one, although they are a part of the designated indemnity lands of the other.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720.

In that case both roads claimed lands granted by the act of March 3, 1857, 11 Stat. 195. Part of these lands were within the place limits of the Winona Company, and also within the indemnity limits of the St. Paul Company. The court held that, although the latter company's road was first located, and although there were deficiencies in its place limits for which it had selected these lands, yet as the grants were *in præsenti*, and both took effect as of the date of the act, the Winona Company was entitled to those lands to the

exclusion of the St. Paul Company. Mr. Justice MILLER, delivering the opinion of the court, said, —

"It follows from these principles that the decision of the Supreme Court was right that the lands embraced in its first class, namely, those found within the six-miles limit of the road of the plaintiff below, the Winona Company, and without the six-miles limit of the defendant, were definitely fixed and ascertained to belong to the former when its line was located, and could not be taken to supply deficiencies in the grant of the other company, whether its road was located first or last." 112 U.S. 727.

This decision was affirmed in *Sioux City & St. Paul Railroad Co.* v. *Chicago &c. Railway Co.*, 117 U.S. 406.

3. The only exception from the act which could be deemed applicable to the premises in dispute was of lands "reserved to the United States."

The land to recover which the present action is brought was confessedly within the grant to the State of Wisconsin made by the act of May 5, 1864, sec. 3, unless excluded from the operation of that act. It is a part of an odd-numbered section within ten miles of the road built as provided in that section and in conformity with its requirements. The land grant was earned for that part of the road with which this land is co-terminous, and a perfect title vested in the State in trust for, and was by it transferred to, the plaintiff, unless this land was excluded from the grant made.

By section 3 of the act, there was granted to the State "every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act" of June 3, 1856. Indemnity was provided for lands

"sold, reserved, or otherwise disposed of" by the United States, and for lands to which the right of pre-emption or homestead had attached. By section 6 of the act, it was provided that "any and all lands reserved to the United States by any act of congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands, be and the same are hereby reserved and excluded from the operation of this act."

The only "terms and conditions" in the act of June 3, 1856, bearing upon this matter were the proviso to the first section, which declares that "any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act." This provision is identical with section 6, except that the latter adds "mineral lands" to those reserved from the grant, and uses the words "reserved and excluded from" in place of the words "reserved to the United States from" the operation of the act.

Whichever clause, therefore, is relied upon to exclude the land in question, it is necessary to show that the land was "reserved" to the United States. The only public land excepted from the act is that so reserved, and the land in dispute, unless so excepted, is undeniably within the description of the grant.

II.

The land was not reserved to the United States merely by reason of its falling within the indemnity limits of the act of June 3, 1856.

The opinion of this court in the cases of *United States* v.

Colton Marble & Lime Co., and *United States* v. *Southern Pacific Railroad Co.*, 146 U.S. 615, is conclusive that the ordinary clause excepting from grants to aid internal improvements "lands reserved to the United States," does not exclude unselected lands within the indemnity limits of an earlier grant.

Those cases arose from the overlapping grants to the Atlantic & Pacific Railroad Company and to the Southern Pacific Railroad Company. Congress, by section 3 of the act of July 27, 1866, 14 Stat. 292, granted land to aid in the construction of the Atlantic & Pacific Railroad. By act of March 3, 1871, 16 Stat. 573, Congress, in section 23, granted land, excluding "reserved" lands, to the Southern Pacific Railroad, "*Provided, however*, that this section shall in no way affect or impair the rights, *present* or *prospective*,* of the Atlantic and Pacific Railroad Company or any other railroad company." The road built under this last act intersected the road of the Atlantic & Pacific Company, and after the forfeiture, by act of July 6, 1886, 24 Stat. 123, of the land grant to the latter road, the Southern Pacific Company claimed, as place lands under its grant, sections within the indemnity limits of the earlier grant to the Atlantic & Pacific Company. The majority of this court held that these lands were not included in the grant to the Southern Pacific Company, because of the proviso attached to that grant that it should "in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company;" and said of that proviso that it —

"distinguishes the grant of 1871 to the Southern Pacific Railroad Com-

* The italics are our own.

pany from most, if not all other, land grants." "Without it, certainly, the Southern Pacific, its grant being of later date, would be postponed to the Atlantic and Pacific; and on the filing by each company of a map of definite location, the title to the lands within the granted limits would vest in the Atlantic and Pacific Company, to the total and absolute exclusion of all claims on the part of the Southern Pacific. The proviso, therefore, was without significance, in respect to such lands. It in no manner strengthened the title of the Atlantic and Pacific, and took nothing away from the Southern Pacific. Yet it cannot be supposed that this proviso was meaningless, and that Congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right. As it could have no effect upon the lands within the granted limits, it must have been intended to have some effect upon those within the indemnity limits, they being the only lands upon which it could operate." 146 U.S. 616, 617.

The court accordingly held that the proviso operated to exclude the indemnity lands under the Atlantic & Pacific grant from the later grant to the Southern Pacific.

The whole force of the argument upon which the opinion of the court rests, depends upon the very distinction between place lands and indemnity lands insisted upon by the plaintiff in the present case. The grant to the Southern Pacific Company, independently of the proviso in question, excluded all lands "reserved" to the United States. If this exclusion was sufficient to prevent it from operating on land within the indemnity limits of a prior grant, then the proviso had no more significance as to indemnity lands than as to place lands, and, so far from imposing "lim-

itations and restrictions different from those generally imposed in such cases," it was mere surplusage. Obviously the court was of the opinion that without the proviso the lands in question would have been subject to the grant to the Southern Pacific Company, and therefore that they were not lands reserved to the United States. This view the minority of the court expressly affirmed, dissenting on the ground that the proviso even did not exclude the lands from the later grant.

The same result is deducible from the opinion of the court in *St. Paul & Sioux City Railroad Company* v. *Winona & St. Peter Railroad Company*, 112 U.S. 720. The facts in that case were as follows: Congress had in 1857 (11 Stat. 195) granted lands to Minnesota for railroad construction to the extent of six miles in place, with fifteen miles indemnity limits. Subsequently, in 1864 (13 Stat. 72), it increased that part of this grant which had become vested in the St. Paul Company, the plaintiff in error, by granting four additional sections per mile, to be chosen within twenty miles indemnity limits. Still later, in 1865 (13 Stat. 526), the same increase was made in favor of all the roads entitled under the grant of 1857. The question arose whether the St. Paul Company could take under its grant made in 1864 any land between the fifteen and twenty miles limits of its road which was also within the fifteen miles limits of the Winona Company, the defendant in error, under the grant contained in the act of 1857. The grant of 1864 for the benefit of the St. Paul Company was made "upon the same conditions, restrictions, and limitations as are contained in" the act of 1857 above referred to, and section 1 of the latter act (11 Stat. 195) contained the proviso that—

"Any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever be and the same are hereby reserved to the United States from the operation of this act."

If, therefore, the indemnity lands of the Winona Company under the act of 1857 were "reserved" to the United States, these were clearly excluded from the grant for the St. Paul Company in the act of 1864. These lands were, however, certified to the St. Paul company upon its selecting them, that company's road having been first definitely located, and this court, in an elaborate opinion by Mr. Justice MILLER, while deciding against the right claimed by the St. Paul Company, rested its decision solely on the ground that the right to indemnity lands in overlapping grants was determined by priority of selection, and that the Winona Company had made the prior selection of the lands in question.

III.

The land in dispute was not reserved to the United States by the action of the Land Department in withdrawing all lands within the indemnity limits of the act of June 3, 1856.

The act of June 3, 1856, did not direct any withdrawal of lands within the limits of the grant thereby made. The action of the Land Department in directing the lands to be withdrawn from sale and pre-emption, while it may have been entirely proper as tending to effectuate the intention of Congress, was not ordered by Congress or by any general law, and could not determine the action of Congress in any subsequent steps it might think proper to take. *Indeed, the original withdrawal was made before the act became a law.*

This court, in a somewhat similar case, indicated the purpose and nature of such withdrawals, saying, —

"Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the Department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those making settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless." *Buttz* v. *Northern Pacific Railroad*, 119 U.S. 55, 72.

This statement was quoted with approval in *St. Paul & Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U.S., at page 18, and the action of the Land Department was described as "only giving publicity to what the law itself declared." In like manner, in the case of a Mexican grant of eleven leagues to be located within exterior limits of much greater extent, the court said, while "the Land Office might properly suspend ordinary operations in the disposal of lands within the territory indicated, and in that sense they might not be considered as public lands," yet the entire territory was not on that account to be excluded from public lands subject to congressional grant.

United States v. *McLaughlin*, 127 U.S. 428, 455.

Such action by the Land Department does not necessarily constitute a *reservation* to the United States of the lands withdrawn. It is not a disposition of a part of the public domain additional to that made by the act containing the grant, but is a ministerial proceeding to facilitate the execution of the act. The Land Department cannot, by virtue of

an order intended only to carry out a disposition made or about to be made by Congress, enlarge or restrict the scope of that disposition. It cannot by such an order constitute a distinct reservation of that which Congress left free and unreserved. It cannot by such an order, which is a mere corollary of the act, determine the construction of a subsequent grant by Congress.

In *Kansas Pacific Railroad Co.* v. *Atchison &c. Railroad Co.*, 112 U.S. 414, this court repudiated the idea that a withdrawal by the Land Department affected the rights under overlapping grants. Speaking of the earliest grant there in question, the court said, —

"The order of withdrawal of lands along the 'probable lines' of the defendant's road made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which without it would have been acquired to the lands, nor in any respect controlled the subsequent grant" (p. 422).

In *St. Paul & Sioux City Railroad Co.* v. *Winona & St. Peter Railroad Co.*, the court said of such a withdrawal, —

"It by no means implies a vested right in said company, inconsistent with the right of the government to sell, or of any other company to select, which has the same right of selection within those limits." (112 U.S. 720, 732.)

In *United States* v. *Missouri &c. Railway Co.*, 141 U.S. 358, 370, it appeared by the record that a general withdrawal of all lands within the ten miles place limits of the grant made by act of March 3, 1863, had been directed by the land department. The court did not in its opinion advert to that fact, which would have been conclusive as

to the controversy over even-numbered sections within those limits, if such withdrawal constituted a reservation; but at some length argued that the even-numbered sections were reserved by the terms of the act itself, because it was provided that those sections should not be sold for less than double the minimum price of the public lands when sold.

Wolcott v. *Des Moines Co.*, 5 Wall. 681, is entirely consistent with this conclusion. The court did not there lay down any general rule as to the effect of an executive withdrawal upon a subsequent grant; it merely decided that, under the peculiar circumstances of that case, Congress intended to exclude from the subsequent grant lands which had been actually withdrawn, approved, and certified by the Land Department to the State of Iowa, and the benefits of which had been conferred by it upon a *bona fide* purchaser.

The facts were these: The Des Moines river traverses the whole State of Iowa. Near the middle of the state it receives as a tributary a stream called the Raccoon Fork. By act of August 8, 1846, 9 Stat. 77, Congress had granted to the then Territory of Iowa —

> "for the purpose of aiding said Territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork (so called) in said Territory, one equal moiety, in alternate sections, of the public lands, (remaining unsold, and not otherwise disposed of, encumbered, or appropriated,) in a strip five miles in width on each side of said river; to be selected within said Territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

Such agents selected land along the whole length of the river in Iowa above as well as below Raccoon Fork. Later

the question whether the grant extended above the fork became the subject of much controversy and of extraordinary diversity of opinion. Between August 8, 1846, and May 15, 1856, the Executive Department of the government passed upon it formally at least eight times under circumstances involving unusual notoriety. Nearly every decision was a reversal of its immediate predecessor. Three Presidents, three Attorneys-General, two Secretaries of the Interior, and a Secretary of the Treasury, besides the several Commissioners of the Land Office, had severally passed upon the construction to be given to the act. In 1851, the question was brought before the President and the Cabinet, and as a result the Secretary of the Interior declared, —

"That in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinions of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State, and to approve of the selections without prejudice to the rights, if any there be, of other parties." 5 Wall. 685.

Thereupon, before 1854, 271,572 acres of land above the fork were approved and certified. Then the Des Moines Navigation & Railroad Company entered into an engagement with the State to finish the improvement of the river at an expense of $1,300,000. On March 21, 1856, the question was again reopened by the Land Commissioner, and being subsequently referred to the Attorney-General, the Secretary of the Interior was advised to continue the approval of lands as theretofore. This advice was acted upon. At December Term, 1859, this court held that the grant made by the act of 1846 did not extend to land above the Raccoon Fork, and then Congress, by joint resolution of

March 2, 1861, 12 Stat. 251, and act of July 12, 1862, 12 Stat. 543, confirmed the title of *bona fide* purchasers from the State of Iowa to lands above the fork, and extended the grant to cover lands above the fork.

By act of May 15, 1856, 11 Stat. 9, Congress granted land to Iowa to aid in the construction of certain railroads, excepting from the grant —

"all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever."

The limits of this grant included some of the lands on the Des Moines river above the fork, which had been withdrawn, selected, and certified by the Land Department to the State under the act of 1846, and by it conveyed to the Navigation Company. The question arose in *Wolcott* v. *Des Moines Co.* whether Congress, by the act of May 15, 1856, had granted away these specific lands so that its confirmatory resolutions of March 2, 1861, and July 12, 1862, were nugatory as to them. The court held that Congress intended to except these lands from the grant for the benefit of railroads.

Mr. Justice NELSON, delivering the opinion of the court, said, —

"This grant to the State for the benefit of the railroads, it is admitted, covers the tract within which the lot in question is situate, unless excluded by this proviso. The question turns upon the construction of the proviso. And in reading it in connection with the act of 1846, granting lands to the State of Iowa for the improvement of the Des Moines river, and in connection with the serious and prolonged conflict of opinion that arose among the executive officers of the government, extending over a period of some eight years, and which related to the title above the Raccoon Fork, in respect to which this act of 1856 was dealing in the grant

for the benefit of the railroads, we think it difficult to resist the conclusion that Congress, in the passage of the proviso, had specially in their minds this previous grant, and conflict of opinion concerning it, and intended to reserve the lands for future disposition, if the title under the first grant should turn out to be defective. The decision of this court had not then taken place, though the litigation was probably pending in the court below, in the district of Iowa. The words of the proviso point almost directly to this grant, and to the dispute arising out of it among the public authorities." 5 Wall. 687.

The court did not there lay down the alleged rule that every withdrawal by the Commissioner will serve to except land from a subsequent grant. It decided merely, *that, in view of the facts which must have been in the mind of Congress, it could not have intended to include in the grant to the railroad, lands which had, after mature and repeated consideration, been previously certified by the executive officers of the government, and the benefits of which had been conferred by the State to aid in the improvement of the river.*

The contention that the reservation clause common to most Congressional grants necessarily excepts the land previously withdrawn by the Commissioner, would lead to absurd results if applied to the case at bar. Such a rule would not only exclude the lands within the indemnity limits fixed by the act of June 3, 1856, from the operation of the first and second sections of the act of May 5, 1864, but would exclude all lands from the operation of the act of 1856 itself. Before the act of June 3, 1856, became a law, the Land Department had withdrawn all lands in the State from sale and entry. If it were true that the exception of "reserved" lands necessarily included all

lands withdrawn, regardless of the intention of Congress, then the act of 1856 could have had no operation whatever. There is no such absolute rule. In every case it is a question of intent, whether, in the particular instance, Congress, by the proviso ordinarily inserted in its land grants, has excepted lands withdrawn to meet possible indemnity selections under a prior grant. That intent must be determined upon a full consideration of all the facts. As hereafter shown, there is as much reason to believe that Congress, by the act of May 5, 1864, intended to *include* in the grant the lands here in dispute as there was that Congress intended, by act of May 15, 1856, to *exclude* the land in dispute in *Wolcott* v. *Des Moines Co.*

IV.

Congress intended to include the land in question in the grant made by section 3 of the act of May 5, 1864, and that intention must prevail.

1. In construing the act, the intention of Congress, as shown by all the circumstances attending the grant, is decisive.

Even if the language employed in the act of May 5, 1864, *standing alone*, would be deemed not to include any land within the indemnity limits of the earlier grant, that construction should not be adopted if contrary to the intention of Congress in passing the act. Such grants are not to be interpreted in a narrow sense, or according to strict rules of construction like private deeds.

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Con-

gress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties." *Missouri &c. Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U.S. 491, 497.

Although public grants are construed strictly against the grantees, —

"they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication." *United States* v. *Denver & Rio Grande Railway Co.*, 150 U.S. 1, 14.

To ascertain the intent, the court must consider not only the language of the act, but the circumstances under which it was passed, the conditions to which it was applicable, and the ends to which it was directed.

Acts making such grants —

"are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Winona & St. Peter Railroad Co.* v. *Barney*, 113 U.S. 618, 625.

This rule of construction was approved in *United States* v. *Denver & Rio Grande Railway Co.*, *supra*, and the court added, —

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to

corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted." 150 U.S. 14.

2. Congress intended the act of May 5, 1864, to supersede the act of June 3, 1856, as to the railroads provided for by both.

(*a*) This intention is manifested by the express provisions of the act when considered in connection with the circumstances at the time of its passage.

The act of June 3, 1856, provided for a single road from Madison or Columbus by way of Portage City to the St. Croix river or lake, and from thence to the west end of Lake Superior and to Bayfield. The grant was upon the condition that the road should be finished in ten years. At the time the act of 1864 was passed, eight years of the ten had almost elapsed, but the construction of the road between Tomah and the St. Croix river, and north from the St. Croix river to Lake Superior and Bayfield, had not been begun. The State of Wisconsin, to which the grant was made, had conferred its benefit upon a corporation organized to build the roads with the assistance of the grant. The line of road had been definitely located, but the grant had proved insufficient to induce construction on the part of the line north and west of Tomah. It was clear that this part of the road could not be completed within the time stipulated. There was no indication that it would even be begun within that time.

Meanwhile, a railroad from the settled centre of Wiscon-

sin to the west end of Lake Superior had become a public necessity. Congress had found that, to secure its construction, the original scheme must be changed, and greater inducements must be offered to capital. The great conception of a northern route to the Pacific Ocean had also taken shape. Under these circumstances Congress passed the act of May 5, 1864, making additional and new grants to the State of Wisconsin. The first two sections of the act of 1864, accordingly, were devoted to the part of the proposed route from Madison by way of Portage to the St. Croix river, and thence to Lake Superior, on which no work had been done. What had originally been planned as a single line of railroad was now separated from the part east and south of Tomah, and was itself divided so as to lessen the magnitude of the enterprise. Instead of a single line between the two ultimate termini, Congress authorized three independent connecting roads, the one already built under the act of 1856, and two new roads, to be built under the act of 1864, covering the balance of the route. To the new roads thus provided for was added a third upon a route direct from Portage northerly to Lake Superior, the present line of the Wisconsin Central Railroad. Only the roads which had already been built or were being built, namely, the road from Madison by way of Portage to Tomah, and from Fond du Lac northerly to the state line, were therefore left subject to the earlier act.

(*b*) The scope of the act of May 5, 1864, shows that it was meant to supersede the act of June 3, 1856, except so far as the latter had been acted upon.

All important matters dealt with in the act of 1856 were

expressly provided for in the act of 1864. In the most important, serious changes were made:

First, the act of 1856 contemplated a single railroad from Madison or Columbus by way of Portage to the St. Croix river or lake, and thence to Lake Superior and Bayfield. For the unbuilt portion of this, the act of 1864 provided two new roads, one from the St. Croix river or lake to Lake Superior, with a branch to Bayfield, and one from Tomah to the St. Croix river or lake.

Secondly, the act of 1856 provided for a land grant of six sections in width on each side of the road, with indemnity limits of fifteen miles; the act of 1864 provided for a land grant of ten sections on each side of the road and indemnity limits of twenty miles.

Thirdly, the act of 1856 permitted one hundred and twenty sections within twenty consecutive miles to be sold before the construction of the road began, and a like quantity thereafter upon the completion of any twenty continuous miles of the road for which it was granted; the act of 1864 provided that the lands should be disposed of only upon the co-terminous principle; that is, upon the completion of twenty miles of road, the granted sections co-terminous with the completed part of the road were to be conveyed.

Fourthly, the act of 1856 imposed as a condition subsequent that the roads should be completed within ten years; the act of 1864 extended the time for completion of the roads following the route fixed in the earlier act to five years from May 5, 1864.

The remaining provisions in the act of 1856 were, with one exception, all expressly re-enacted in the act of 1864, and that provision was either intentionally dropped (as seems most probable) or incorporated by reference. The

following tabulation of the two acts indicates the extent to which the later act superseded the former, the parts of each not appearing in the other being printed in italics: —

ACT OF JUNE 3, 1856.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

That there be, and is hereby, granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from *Madison, or Columbus, by the way of Portage City to* the St. Croix River or Lake, between townships twenty-five and thirty-one, *and from thence* to the west end of Lake Superior; and to Bayfield; *and also from Fond du Lac, on Lake Winnebago, northerly to the State line*, every alternate section of land designated by odd numbers for *six* sections in width on each side of said roads, *respectively*.

But in case it shall appear that the United States have, when the lines or routes of said roads *are* definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by *the governor of said State*, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, *so* much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by *the* State *of Wisconsin* for the use and purpose aforesaid:

ACT OF MAY 5, 1864.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

That there be, and is hereby, granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from *a point on* the Saint Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and *from some point on the line of said railroad, to be selected by said state*, to Bayfield, every alternate section of *public* land designated by odd numbers, for *ten* sections in width on each side of said road, *deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose, by the act of congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six*. But in case it shall appear that the United States have, when the line or route of said road *is* definitely fixed, sold, *reserved, or otherwise disposed of*, any sections or parts thereof granted as aforesaid, or that the right of pre-emption *or homestead* has attached to the same, then it shall be lawful for any agent or agents, to be appointed by *said company*, to select, subject to the approval of the Secretary of the Interior, from the *public* lands of the United States nearest to the tier of sections above specified, *as* much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption *or homestead* has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption *or homestead right* has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by *said* state for the use and purpose aforesaid:

Provided, that the lands to be so located shall in no case be further than *fifteen* miles from the line of the roads *in each case, and selected for and on account of said roads:*

Provided further, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever:

And provided further, That any and all lands reserved to the United States by any act of Congess for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved *to the United States* from the operation of this act, except so far as it may be found necessary to locate the route of *said* railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, That the sections and parts of sections of land which, *by such grant*, shall remain to the United States within *six* miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold: nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 3. And be it further enacted, That the said lands hereby granted *to said State* shall be subject to the disposal of the *legislature thereof*, for the purpose aforesaid, and no other: and the said railroads *shall* be and remain public highways for the use of the Government of the United States free from toll or other charge *upon* the transportation of property or troops of the United States.

SEC. 4. And be it further enacted,

Provided, That the lands to be so located shall in no case be further than *twenty* miles from the line of the *said* roads, *nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June three, eighteen hundred and fifty-six, should any such deficiency exist.*

SEC. 2. [This section made a grant in similar terms for the road from Tomah to St. Croix river or lake.]

SEC. 3. [This section made a grant for the route covered by the Wisconsin Central Railroad, not provided for in the act of 1856.]

SEC. 6. *And be it further enacted*, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, *and all mineral lands* be and the same are hereby reserved *and excluded* from the operation of this act, except so far as it may be found necessary to locate the route of *such* railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

SEC. 4. And be it further enacted, That the sections and parts of sections of lands which shall remain to the United States within *ten* miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of the said *reserved* lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 8. And be it further enacted, That the said lands hereby granted, shall, *when patented as provided in section seven of this act*, be subject to the disposal of the *companies respectively entitled thereto*, for the purposes aforesaid, and no other, and the said railroads be, and *shall* remain, public highways for the use of the government of the United States, free from *all* toll or other charge, *for* the transportation of *any* property or troops of the United States.

SEC. 7. And be it further enacted,

That the lands hereby granted to said State shall be disposed of by the said State only in manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed;

and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.

SEC. 5. And be it further enacted, That the United States mail shall be transported over said roads, under the direction of the Post-Office Department, at such price as Congress may, by law, direct: Provided, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.

That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: Provided, however, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States.

SEC. 9. And be it further enacted, That if said road mentioned in the third section aforesaid is not completed within ten years from the time of the passage of this act, as provided herein, no further patents shall be issued to said company for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 5. And be it further enacted, That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six, be, and the same is hereby, extended to a period of five years from and after the passage of this act.

It thus appears that, in passing the act of 1864, Congress dealt with the whole subject covered by the act of 1856, so far as concerned the road from Tomah to St. Croix river or lake, and thence to Lake Superior and Bayfield. Nothing remained of that act affecting the roads included in the act of 1864, and not expressly covered by the latter, except the provision as to transporting the mails. Not only did Congress alter the act of 1856 in the particulars pointed out, but, what is perhaps even more significant, it expressly re-enacted those provisions of the act of 1856 which were not altered. Congress must have intended by this course to revise the entire matter common to the two acts, and to substitute for the act of 1856 the revised provisions contained in the act of 1864, for this purpose incorporating in the latter not only the changes made in the former, but also those parts remaining unchanged.

"Where two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal." *King* v. *Cornell*, 106 U.S. 396, 398.

Here, as in the case last cited, "the whole subject was evidently up for consideration."

(*c*) The nature of the changes made by the act of 1864 shows that it was deemed to supersede the act of 1856, except so far as the latter had been acted upon.

i. The act of 1864, in sections 1 and 2, which dealt with the roads also included in the act of 1856, made no reference to the lines of definite location already fixed. Under the act of 1856 maps of definite location had been filed for the whole route, although no steps had been taken to con-

struct the roads. The act of 1864 did not recognize these as existing locations; for it defined the route by the termini alone, and expressly stated that the Bayfield branch was to be from a point to be selected by the State. Under these provisions entirely new locations might have been fixed. The particular lands included in the grant could be determined only upon the definite location of the roads, and were not, therefore, to be determined in any way by reference to the act of 1856. It is true that the St. Croix & Lake Superior Railroad Company, which took the benefit of the grant in the first section of the act of May 5, 1864, in fact adopted the location from St. Croix river or lake to Lake Superior made by it under the earlier act, and that the State selected the same point of departure for the Bayfield branch as that fixed under the earlier act. But those facts were merely accidental. They cannot affect the construction of the act. On the route from Tomah to St. Croix river or lake provided for in the second section of the act of May 5, 1864, a new location was in fact made. The possibility of this change of location, under the act of 1864, involving a change of the lands to be affected by the grant, indicates that Congress intended the act of 1864 to stand independently, and to supersede the earlier act except so far as the latter was incorporated by reference.

ii. The act of 1864 entirely altered the method of administering the grant by introducing the co-terminous principle. Under the act of 1856, the lands were disposed of by the sale of one hundred and twenty sections within twenty consecutive miles, and after the completion of each twenty miles of road, the sale of a further amount of one hundred and twenty sections, which, however, need not be co-

terminous with the section of road completed. That Congress meant this change to apply to the administration of all the lands granted to the roads is clear from the phraseology employed in section 7; and that such was the effect was decided by the Circuit Court (composed of Mr. Justice HARLAN and Justices DRUMMOND and BUNN) in 1879, in the case of—

Madison & Portage Railroad Co. v. *Treasurer of State of Wisconsin et al.* (not reported).

(*d*) The similarity of purpose of the two acts shows that the former was not intended to affect the operation of the latter.

The acts of 1856 and 1864 were made to the same grantee — the State of Wisconsin; and for the same purpose — the building of railroads between the termini mentioned. The act of 1864, it is true, added a third route, which was not dealt with in the act of 1856, but this was an addition to an act which otherwise was strictly *in pari materia* with the act of 1856, and cannot be deemed to affect the relation of the one act to the other. The case falls within the principle laid down in —

Kansas City &c. Railroad Co. v. *Attorney General*, 118 U.S. 682.

In that case the court considered the effect of successive statutes granting lands to the State of Kansas to aid in building a road down the Neosho valley. By act of March 3, 1863, 12 Stat. 772, and a supplementary act of July 1, 1864, 13 Stat. 339, Congress granted lands to Kansas to aid in building a road through the region in question. These lands

were by the State conferred upon the Atchison, Topeka & Santa Fe Railroad Company for the purpose of building the road. That company did not, however, build, but on March 9, 1866, made an agreement with another corporation by which the latter assumed all the obligations of the former as to building the road, and acquired, so far as by such an instrument it could, all interest in the grant. Subsequently, by act of July 26, 1866, 14 Stat. 289, Congress made a new grant to the State of Kansas to aid this latter corporation in building a road through the same region described in the earlier acts. The act of 1866 contained the ordinary clause reserving lands previously granted by the United States, and it was, the court said, "argued with great earnestness that these lands were necessarily reserved under this clause of the act of 1866, from the grant as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement." 118 U.S. 689. The court decided that this contention was unfounded, and said, —

"If at the time that the act of 1866 was passed, the A. T. & S. F. R.R. Co., or any other company than the one to which the grant of 1866 was made, was intending to build a road, or expected to build one, or had any authority from the State of Kansas to build one, under the acts of 1863 and 1864, the argument would have force." 118 U.S. 689. "The history of the legislation of Congress and of the State of Kansas on this subject almost conclusively shows that the several statutes are to be taken and construed as *in pari materia*, and that the only object was the building of one road." 118 U.S. 690.

The views thus expressed as to relation of the successive acts to one another are pertinent in the present case. Congress must have been aware at the time the act of 1864 was passed of the condition of things then prevailing in Wisconsin. Its intent was to promote the purpose for which it

originally made its grant, by greater inducements, not to reserve from the operation of the act lands which it had dealt with in the earlier statute.

3. The act of 1864 itself provided what effect the prior grant should have, and that provision does not exclude these lands from the new grant.

The act of 1864, in making the grants contained in sections 1 and 2, used the following language in defining the extent of the grant : —

"ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by the act of Congress of June three, eighteen hundred and fifty-six."

And again, with reference to selecting indemnity lands : —

"Provided that the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June three, eighteen hundred and fifty-six, should any such deficiency exist."

Both the act of 1856 and that of 1864 made a grant *in præsenti*, which upon the location of the road became a grant by description or in place, and not of quantity.

Schulenberg v. *Harriman*, 21 Wall. 44.

The provision first quoted above was directed to the case of a part of the lands granted in the second act being identical with those granted in the first act. In such contin-

gency, the sections comprised in the earlier grant were to be deducted from the grant in the later act. The purpose plainly was that there should not be a grant of ten sections in addition to the grant of six. The same purpose was further effectuated by declaring that no indemnity lands should be selected for the lands thus deducted from the ten sections granted by the act of 1864. As to indemnity lands, Congress made the only provision necessary, namely, that indemnity for any losses within the ten miles limits, whether occurring within the six miles limits of the act of 1856 or within the extended place limits under the act of 1864, might be made good by selections "from the public lands of the United States nearest to the tier of sections above specified [the ten miles limits] . . . in alternate sections."

Congress thus provided precisely what effect the grant in the act of 1856 should have upon the operation of the act of 1864. Lands granted in place by the earlier act, so far as they fell within the place limits fixed in the later act, should be counted as a part of the grant made by the latter, and all indemnity selections should be made under the later act. If Congress had intended that indemnity lands under the act of 1856 should be preserved for the purpose of providing indemnity for deficiencies in the place limits specified in that act, it would undoubtedly have so provided expressly. Instead of doing so, it provided that such deficiencies should be made up from selections in the extended indemnity limits. These provisions contemplated that the act of 1856 should cease to be effective as to the indemnity lands. If Congress had intended that it should have any operation, it would have provided how the earlier act should operate in that respect, just as it provided for the operation of the ear-

lier act with reference to place lands. It is not reasonable to assume that Congress, after expressly providing that the granted lands under the act of 1856 should be excepted from the grants of 1864 only to the extent of preventing a cumulative grant of ten sections in addition to six, intended that the indemnity lands should reduce the beneficial operation of the act of 1864.

4. The contrary construction of the act would deprive it of much of its effect.

No increase of place lands could be effected on any part of the road where the two grants coincided. Unless the entire location was changed to the extent of over five miles laterally, no increase of place lands would result from the act of 1864; its only effect would be to increase the right to indemnity and the area from which indemnity might be selected. Only by moving the location laterally twenty-five miles could the full increase of place lands provided by the terms of the act of 1864 be secured.

Wherever the location remained unchanged the odd sections in the first six tiers of sections would be deducted as granted by the act of 1856; the next nine tiers would be excluded from the grant, and subject only to indemnity selections for losses in the first six tiers; the lands in the remaining five tiers of sections within the twenty miles limits of the act of 1864 would be outside the place limits and available only for indemnity selections. From these sections would have to be taken by indemnity selection the entire increase of four sections in the grant made by the act of 1864.

The possibility of such a result sufficiently shows that the proper construction of the act must be one which produces

the effect corresponding to what appears to have been the intent of Congress, viz., that the new act should supplant the old act, for this purpose, and should divide the land, as usual into ten miles of place lands, and ten miles of indemnity lands beyond.

5. The act of 1894 must receive the same construction as to the grant in the third section and as to the grants in the first and second sections.

(*a*) It will be contended, no doubt, that, while the foregoing considerations may be decisive as to the effect of the grants in the first and second sections of the act of 1864, the same considerations do not apply to the third section. This position is unfounded.

The language used in the three sections is identical in this respect. The only differences between the sections are in the termini of the several roads, and the omission from section 3 of the provisions for deducting lands granted for the same purpose under the act of 1856, and prohibiting the selection of indemnity lands in lieu of lands granted under that act while allowing selections for losses from the grant there made. These omissions were necessary since the third section dealt with a route for which no grant had been made in the former act.

The exclusion from the grant made by section 3 of the act of 1864 arises, if it exists, only from the terms of section 6 of that act. It is conceded in the opinion delivered in the circuit court in this case (Record p. 101) that "if the present case depended upon the first and third sections of the act of 1864, without reference to the sixth section, there would be ground for holding, in respect to the particular lands in dispute and other lands similarly situated that the

Omaha Company, and the Central Company became tenants in common without regard to priority of construction." The learned judges of the Circuit Court, however, construed section 6 as creating such an exclusion from the grant in section 3, while disclaiming the idea that it had the same effect upon the grants in sections 1 and 2. It is impossible to discriminate between these grants as to the effect of section 6; in order to make a distinction, an additional provision must be read into the statute.

Section 6 declares that "lands reserved to the United States by any act of Congress . . . are hereby reserved and excluded from the operation of this act." The provision is the usual one found in all the land-grant acts, and it was unquestionably intended that the grants in sections 1 and 2 should be subject to the usual limitations upon such grants imposed by these words in other acts. Since, therefore, section 6 must be applicable to sections 1 and 2, the question is simply to determine the meaning of the words used. If the words "lands reserved to the United States" in section 6 include indemnity lands under the act of 1856 within the limits of the withdrawal made by the Land Department, then the effect of the section is to exclude those lands "from the operation of this act," and that cannot be construed to mean only from the operation of section 3 of this act. On the other hand if the words in question do not include such indemnity lands then the reservation and exclusion of section 6 does not withdraw those lands from the operation of section 3 any more than from the operation of sections 1 and 2. The exclusion is created by defining certain lands, and then declaring that the act shall not operate upon them. Had these lands been defined by any other description it would hardly be suggested that part of the act could operate

upon them in spite of the express terms of section 6. But the manner of defining can make no difference. The effect is precisely the same as if Congress had enumerated the sections which had been "reserved to the United States," and declared that on those sections the act should not operate. It would be making a new law instead of construing the law made by Congress to declare that as to a part of the act this express provision should have no effect.

(*b*) Congress appears to have intended that the three roads provided for in the act of 1864 should be dealt with in precisely the same manner. The circumstances under which the act of 1864 was passed, which have already been considered, indicate that the purpose was to supersede the old act, and by the new act to make a new attempt to carry out the general plan as part of which the first act had been passed. That plan contemplated the construction of a road through the central part of the state to Lake Superior, and Congress accordingly in the act of 1864 incorporated with the other roads this third road for which no grant had previously been made. The fact that all three roads were dealt with in a single piece of legislation indicates the close relation between them as parts of a single scheme, and indicates further that Congress meant to deal with all three similarly. The intention to supersede the old grant by a new one giving land afresh in like terms to the State for the construction of these three is apparent. The act of 1856 was not expressly repealed, because it still controlled that part of the line from Portage to Tomah, and the grant of six sections per mile for the remainder of the route, was left undisturbed in order that if the same location was adopted no land should be lost from the grant within

these limits through possible intervening rights. From abundance of caution Congress provided that the granted lands under the act of 1856 should be deducted from the new grant, to prevent the possibility of a cumulative grant of ten full sections. These facts do not, however, tend to show that the roads provided for in sections 1 and 2 were meant to have any priority over the road in section 3. Had Congress intended to preserve for them priority in the indemnity lands of the old grant, it would have expressed such an intention instead of indicating the contrary by dealing with all three jointly in a single statute.

B.

The land in dispute falling within the grant made in section 3 of the act of 1864, the plaintiff is entitled to recover in this action.

I.

The plaintiff shows an exclusive title to the land.

1. The plaintiff's right was superior to that of the Omaha Company.

The rule governing overlapping grants is, that as to lands within the place limits priority of grant controls.

Missouri &c. Railway Co. v. *Kansas Pacific Railway Co.*, 97 U.S. 491, 500, 501.

If the grants are made at the same time, neither grantee has priority as to the lands within their overlapping place limits, but they are entitled as tenants in common to such lands.

St. Paul & Sioux City Railroad Co. v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720, 727.

In the case of simultaneous grants, if the lands granted in place do not overlap, but the lands so granted to one company are within the indemnity limits of the simultaneous grant to the other, the former is entitled to the whole of its granted lands, without reference to the time of location or construction of the roads respectively.

Sioux City & St. Paul Railroad Co. v. *Chicago &c. Railway Co.*, 117 U.S. 406.

In the present case, if the act of 1864 superseded the act of 1856 as we have contended, the grants in favor of the plaintiff and of the Omaha Company are both derived from the act of 1864. As the lands are within the place limits of the grant to the plaintiff and outside the place limits of the grant to the Omaha company, the former became entitled to them to the exclusion of the latter, independently of the arrangement between the two companies by which it was agreed that the plaintiff should have these lands. If the act of 1864 did not supersede the act of 1856, yet, as has been shown, it included these lands, although they were within the indemnity limits of the earlier grant, and gave them to the State for the benefit of the road constructed by the plaintiff. It has already been shown that Congress had power subsequently to grant lands that were within the indemnity limits of an earlier grant, and that such was the effect of the act of 1864. In either event, therefore, the plaintiff upon compliance with the conditions of the grant to the State of Wisconsin, and from the State to it, became entitled to the land to the exclusion of all other claims under either the act of 1856 or that of 1864.

2. The plaintiff fulfilled the conditions of the grant to it, and thereby acquired a good title as against all other persons.

(*a*) It cannot be denied that the plaintiff earned the land in dispute, if that land was subject to the grant. The act of May 5, 1864, section 3, operated as a grant *in præsenti* to the State of Wisconsin for the benefit of the corporation that should be authorized to build and actually should build, in compliance with the terms of the act, the road specified. The benefit of this grant was transferred to the plaintiff. Upon the definite location of its line on October 7, 1869, the lands covered by the grant became identified, and an absolute title vested in the plaintiff, subject only to the right of forfeiture for failure to build the road as required by the act.

Schulenberg v. *Harriman*, 21 Wall. 44.
Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496.
Deseret Salt Co. v. *Tarpey*, 142 U.S. 241.

The section of the plaintiff's road with which the lands in question are coterminous was completed October 19, 1873 (Record, p. 32), long before any forfeiture could occur. On that date the plaintiff acquired an indefeasible title in these lands which could not be divested by any subsequent failure to complete the whole road within the time limited.

Wisconsin Central Railroad Co. v. *Price County*, 133 U.S. 496, 510.

The defendant's claim, founded on the assumption that the statute of 1887 restored these lands to the public domain and made them subject to entry, must therefore fail, since the plaintiff's rights had become finally fixed before the passage of that statute.

(*b*) The plaintiff's title became perfect without the issue

of any patent by the United States. A direct legislative grant is a conveyance in the most solemn form. Nothing further is required to convey a title from the United States to its grantees. A patent may be useful as evidence to identify the land as within the grant or to prove compliance with conditions imposed by the grantor, but is not necessary to a perfect transfer of title.

> *Wisconsin Central Railroad Co.* v. *Price County*, 133 U.S. 496.
> *Deseret Salt Co.* v. *Tarpey*, 142 U.S. 241.
> *Langdeau* v. *Hanes*, 21 Wall. 521, 529.

The act of May 5, 1864, section 3, therefore transferred to the State of Wisconsin for the benefit of the plaintiff a complete title, which by the subsequent grant and patent from the State to the plaintiff, and fulfilment by the latter of all conditions, became indefeasibly vested in the plaintiff without the issue of a patent.

3. The decision of the officers of the Land Department adverse to the plaintiff is of no effect.

The doctrine is well settled, that decisions by the Land Department and by the Secretary of the Interior as its head, upon appeal, are conclusive only as to those questions of fact of which the Department is by law given jurisdiction. So far as the action of the Department is based upon the determination of facts of which it is given cognizance, its action is judicial and can be attacked only by appeal, or by proceedings to set it aside for fraud or similar cause. In construing the law, however, the Department is not exercising a judicial function conferred upon it. Any action by it, therefore, founded upon a mistake of the law applicable to the case, or an erroneous interpretation of a statute, is open

to collateral attack and has no binding effect. In such cases the action of the Department "is not merely irregular but absolutely void, and may be shown to be so in any collateral proceeding."

Noble v. *Union River Logging Railroad*, 147 U.S. 165, 175.
Shepley v. *Cowan*, 91 U.S. 330, 340.
Quinby v. *Conlan*, 104 U.S. 420.
Van Wyck v. *Knevals*, 106 U.S. 360.
Doolan v. *Carr*, 125 U.S. 618, 624.
Cunningham v. *Lake Superior &c. Co.*, 155 U.S. 354, 375.

This doctrine is well illustrated, as applied to cases like the present, in *St. Paul & Sioux City Railroad Co.* v. *Winona & St. Peter Railroad Co.*, 112 U.S. 720. In that case suit was brought by the Winona Company to establish its rights to lands which had been certified to the St. Paul Company by the Secretary of the Interior, after a contest before the Department between the parties to the suit. Judgment was rendered in favor of the Winona Company, and this court, in affirming the judgment, said, —

"It is no answer to this to say that the Secretary of the Interior certified these lands to the State for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for *lieu* lands or for the extended grant of 1864, out of any odd sections within twenty miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands." 112 U.S. 733.

II.

The plaintiff can enforce its rights in this action.

The plaintiff can maintain an action at law although no patent has been issued by the United States.

It has already been shown, that a patent is not necessary to complete a title derived from direct legislative grant from the government. A title so acquired is sufficient to support an action to assert the rights of the grantee as well as for all other purposes. If a patent has been issued to an adverse claimant, one deriving title from such a legislative grant may bring suit in equity to have the patentee declared a trustee for him, and ordered to convey to him.

Van Wyck v. *Knevals*, 106 U.S. 360.
Walden v. *Knevals*, 114 U.S. 373.

If the patentee brings an action of ejectment against one deriving title from such a grant, the latter may defend his possession by showing the priority of the grant.

Whitney v. *Morrow*, 112 U.S. 693.
Doolan v. *Carr*, 125 U.S. 618.

If one claiming under such a grant is himself out of possession, he may maintain an action at law to recover possession.

Grinnell v. *Railroad Co.*, 103 U.S. 739.

EDWIN H. ABBOT,
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HOWARD MORRIS,
March, 1895. WILLIAM H. DUNBAR,
Counsel for Plaintiff.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 238.

THE WISCONSIN CENTRAL RAILROAD COMPANY,

Plaintiff in Error,

vs.

WILLIAM O. FORSYTHE.

AN ARGUMENT ON THE PART OF THE PLAINTIFF IN ERROR.

WILLIAM F. VILAS,
Of Counsel.

BYRON S. ADAMS, PR., 512 ELEVENTH ST.

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AN ARGUMENT ON THE PART OF THE PLAINTIFF IN ERROR.

There is but a single and simple point of controversy in this case, however confusing the perusal of the pleadings and documents which make up the record, most of which affect but collateral incidents of the question involved.

In 1856, by the act of June 3d, the Congress of the United States, in pursuance of the purpose to effect a more rapid development of the inaccessible and forest-bound Northwestern country round about Lake Superior, which had other expression in grants at the same time to Michigan and the next year to Minnesota, made grants of land (six sections to the mile with fifteen-mile indemnity limits) to the State of Wisconsin to promote construction of two lines of railroad from the settled country in the south of the State through the vast woods of the north to the lake. One of these roads, with which we are not now concerned, was to extend from

Fond du Lac, on Lake Winnebago, along the eastern side of the State and reach the great northern water in Michigan.

The other was to begin at Madison or Columbus, and thence to run, "by the way of Portage City to the St. Croix River or Lake, between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior, and to Bayfield." The Legislature of Wisconsin fixed Madison as the initial point, and the route was located from there north to Portage City, thence northwesterly to a point since called Tomah, thence to Prescott, on Lake St. Croix, thence north by east to a place now called Spooner, whence the line forked, one branch extending north to Superior, at the west end of Lake Superior, the other northeast to Bayfield. The State selected the La Crosse and Milwaukee R. R. Co. as its constructing agent, and proffered it the grant on the condition precedent of construction in compliance with the act of Congress, and certain additional requirements by the Legislature. That portion of the land-grant road between Portage City and the point of Tomah, sixty-one miles, lay upon the line of that company's road between Milwaukee and La Crosse, and, as a part of that line, was completely built before the end of April, 1858. But, by reason of failure to comply with conditions prescribed by the State, the company did not entitle itself to any part of the grant, and the State, as grantee and trustee of Congress, refused to convey any of the granted lands to it. The company became bankrupt, and sale under a foreclosure of its mortgages transferred, in 1863, all its railroad property to another owner.

The State made other attempts to procure the construction of the land-grant road—hoping to secure some parts, if not the whole—by proffering to three different companies so much of the lands granted as were available to aid the three parts, respectively, from Madison to Portage, from Tomah to Lake St. Croix, from Lake St. Croix to Lake Superior.

But all three companies proved valueless and no real progress resulted; nothing more was constructed; and, since what was built by the La Crosse and Milwaukee Company, though on the land-grant line, in no sense promoted the purpose of the grant, and had passed into ownership antagonistic rather than friendly to it, the failure of the project of Congress, as it was formulated, was, by 1864, utter and irredeemable. The offered aid was insufficient to stimulate capital to the venture; and no hope whatever remained that the road would be built on the terms proposed.

The desirability of its early construction had, however, much increased, and reasons for it were more urgent than in 1856. It had become more clearly apparent that a long period must elapse before private capital would, unaided, submit to the risk and delay of profitable returns involved in building a railroad for over two hundred miles through a dense forest with only the settlements of the Lake Superior country as the supply of its traffic for years to come.

Yet, the residents of the upper region, who had undergone many and great perils and discomforts, pressed strenuously for railroad communication, urging not only the gains of a speedy development of the country, but a far more persuasive appeal arising from the horrors of the Indian War of 1863—not exceeded, perhaps not equalled, in extent, in atrocity, in destruction of life, by any like trouble in our history.

The Civil War was, also, then at its height, and the Congress, in pursuance of its wise policy to bind by closer communication the distant parts of the continent, was perfecting the legislation for the Northern Pacific Railroad, the eastern terminus of which was to be "a point on Lake Superior in the State of Minnesota or Wisconsin;" indicating Duluth and Superior at the west end of the lake, or

the Chequamegon Bay, sixty miles further to the east; to both which points, practically the same fixed by the act of 1856, the road has since been built. It was, therefore, in some sort a necessity with the Congress to make renewed efforts to stimulate railroad communication between Western Lake Superior and the country south of the big woods.

Urged by these and other reasons, the Congress passed the act of May 5, 1864, by which new and larger grants, ten sections to the mile, were made, in two parts, to promote the former project of a road through the northwestern region of the State to the lake; and also, conspicuously marking the desire of Congress to secure this communication, a similar but new grant to aid another project to reach the same points on the lake through the central portion of the State.

All these grants were made to the State, the same grantee as in the act of 1856; no rights had intervened which qualified the power of Congress and the State over the subject; and the State, by its Legislature, formally accepted the new grants and consented to execute the trust according to the purposes of Congress.

The act of 1864 made these as three separate and independent grants; all in terms to vest the title *in præsenti* in the State; and, of course, as of the date of the act. By the first section were given "for the purpose of aiding in the construction of a railroad from a point on the St. Croix River or Lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad to be selected by said State, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as are contained" in that act; followed with provision for location

of line and selection of deficiencies within twenty-mile limits.

By the second section were given "for the purpose of aiding in the construction of a railroad from the town of Tomah, in the county of Monroe in said State, to the St. Croix River or Lake, between townships twenty-five and thirty-one," another like grant, the words of the first section being thence repeated.

By the third section, "for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction, to *Bayfield* and thence to *Superior*, on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, *upon the same terms and conditions as are contained" in the act of June 3, 1856;* with like provision for location of route and indemnity selections as in the two preceding sections.

Thus Congress made a new attempt to procure a railroad to the lake; and wisely, as the event proved, for this road was built first by years, and it was, in truth, the development caused by it that stimulated the building of the other which lagged until long after the time limited by the grant.

It must have been foreseen, as it was inevitable, that the boundaries of the grants made by the first and third sections would overlap, so that some of the lands affected would be given by both grants; but as between Congress and the State, should the latter directly build, this mattered not; and if it became important to separate the shares due to each grant, the beneficiaries of the two must take as tenants in common of such doubly-granted land. In fact, the State so administered the grant, and apportioned accordingly the land which fell within the common limits to the two companies which it employed to construct the roads; these two companies themselves agreeing upon the principles and de-

tails of division, with the approval of the State. Whereupon the Governor of the State, under authority conferred by the Legislature for the purpose, duly conveyed to each the lands appertaining to it, as its proper share of the common territory of the grants, by deeds of conveyance properly executed.

It happened that the company which built the road provided for in the first section of the act of 1864 was able to obtain within the limits of that grant nearly or quite the full quantity of acres which the grant carried on the ground, its indemnity limits being sufficient to supply deficiencies. But it was not so with the other, the pioneer road. Lumbermen had pushed from an early day into the forests of central Wisconsin, and purchases from the United States had so greatly reduced the quantity of public land remaining that far less than the granted quantity could be awarded to it in aid of its enterprise. In fact, the best of the lands available lay in the Lake Superior border, and, in considerable part, within the common limits of the two companies already spoken of.

The contention since raised and now presented by this controversy aims still further to reduce the quantity well earned by it and clearly within the apparent terms of the grant, as well as to do great injury to many innocent purchasers upon the faith of what seemed a simple, clear, direct and perfect title.

The land in controversy lies within the ten-mile granted or "place" limits of the line of railroad located under the third section, and entirely without the ten-mile or "place" limits of the line located under the first section of the act of 1864. It belonged to the United States at the time of the grant, the United States had no other use for it than to aid these roads, and, it was therefore apparently part of the domain which passed to the State *in præsenti*. That act,

however, contained in its sixth section a provision, common alike to all three of the grants made in its first three sections, "that any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever, and all mineral lands, be and the same are hereby reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

And it had happened that, in accordance with the practice then prevailing, the Commissioner of the General Land Office had, first, in anticipation of the Presidential approval of the act of June 3, 1856, telegraphed the land offices in Wisconsin in whose districts the expected grant would lie, on the 29th of May, to suspend "from sale and location all the lands" in such districts; and, secondly, on the 12th of June, renewed this direction by letter; and, thirdly, on the 26th of October, 1856, further instructed these land officers that upon the filing in their offices of the duly certified maps of the location of the route of the railroad they should "cease to permit locations by entries or pre-emption or for any purpose whatever of the land within fifteen miles of said route," the limits of indemnity selections. Later on, after the route maps were filed, this direction was limited to the odd-numbered sections.

Now, upon this basis the claim is raised that all the lands within the fifteen-mile limits of the route located under the act of 1856 were excepted from the grant of 1864 as against the third section of it, though not against the first; so that the lands which lie within those limits are to be withheld by the United States as public land not granted to the State, notwithstanding they lie within the ten-mile limits

of the route located under the third section, outside of the ten-mile limits of the other, and are not needed nor selected as a part of the other grant.

Unless this proposition is to be affirmed by this Court, the judgment to which the writ of error went must be reversed. Otherwise there is no shade of defect in the title of the plaintiff in error.

I.

It will be seen at once that this controversy, although presented on the record between the constructing agent of the State and a private claimant seeking to put the new theory to his own use, is, in truth, between the United States and the State of Wisconsin. It is a question of intention between the former as grantor and the latter as grantee. Like all such questions, it must be rightfully decided as of the date of the grant; and to "think straight and see clear" requires one to place himself in the circumstances of that time and read the words used in the light of the conditions then existing and inducing to the grant, so as to understand with justice what object was sought by the United States, and what inducement they meant to carry to the State to effect it. To treat the question as one arising between different railroad companies or between a railroad company and so-called settlers on the public domain, and thus entangle it with contentions growing out of subsequent transactions and later created interests, is only to confuse the mind and darken judgment. The Congress either intended

to grant this land to the State, to induce construction of the road mentioned in the third section, on the 5th day of May, 1864, or it did not. If it was so designed, the title passed to the State as of that day, and never has returned to the United States so as to be available to this "settler's" attempt to get it, with all the increased value the construction of the road and the country's development have given it.

Again, it is fairly to be considered that the parties to this grant were not private persons, but sovereign governments between whom no trick of words, no subtle or hidden purposes, no idea of overreaching, can be either supposable in the transaction or tolerable in the subsequent inquiry to ascertain what was meant by it. It is as much due to the honor and dignity of the United States as it is to the spirit of justice, to read their grant as equal in the force of its words to the compass of the obvious intention then entertained to induce the construction of a road or roads by the gift of the adjacent lands in odd-numbered sections along the proposed routes.

And can it be justly supposable that the Congress designed to offer to the State any less than all the lands in the odd-numbered sections for ten sections in width on each side of the proposed routes, saving, of course, its reservations for the uses of the General Government, and the mineral-bearing lands? Taking into view the circumstances and conditions mentioned, though but briefly, is it not beyond suspicion that it was as surely purposed by Congress as it was accepted by the State—and all others until this ingenious device of interpretation was lately raised—that all the odd-numbered sections of the open Government land within ten miles were to go to the State to build these roads? Is it conceivable, is the conception tolerable, that the Congress secretly entertained design to withhold out of the grant all of the lands within the limits of fifteen miles from

the old route of 1856 which should exceed six sections to the mile; such cunning reservation being only for the purpose of keeping them in the public domain for settlement or sale, notwithstanding the double price on the even-numbered sections made up their money cost? And how much less conceivable is this purpose, when specially addressed to the new project in the act of 1864 for a road through the central portion of the State, it being well known that it would be impossible to fill the grant at best?

These suggestions illustrate the first and complete answer in sound reasoning to the proposed new interpretation of the act of 1864. It is not interpretation, but destruction. All the circumstances of the time, the nature of the legislation and the project, the character of the parties to the grant, demonstrate that, however specious, subtle and skillful the refinement of argument to support such a reservation, it is beyond fair belief that Congress intended to withhold from the State altogether and keep back for sale or settlement any part of these odd-numbered sections, not mineral lands, which, but for these grants, would be open to common entry. Had the suspicion then arisen that such a meaning was possible to be taken from it, the grant would undoubtedly have explicitly removed it. The Congress desired to secure these roads; to make sure of early communication by rail between the isolated Lake Superior country and the far-away settlements to the south; and they devised no trick of phrase to withhold a part of what they seemed to grant the State.

Contentions not infrequently arise in the affairs of men supported by arguments apparently of logical force, but which an overruling sound sense, a judgment superior to the subtleties of ratiocination, easily condemns as unfair, unjust, insupportable. This is such an one.

No one conceived at the time of this grant, so plainly in-

tended to provide additional inducement to build the desired railroad communication by new and increased donation to the State, that because a withdrawal had been made for the benefit of the State under the former proposal, which had so utterly failed, therefore those lands were not now to pass to the State by this language which expressly included them in the granting clauses. The State might have directly constructed these roads; and that it effected the object by the aid of its corporate agents does not diminish its right. Suppose it had; and no division of the lands being necessary, who would have dreamed of claiming to withhold these lands from the State? The State assumed without a question to own all these odd-numbered sections. It executed its deed for them in just apportionment, according to its bargains, to the constructing companies who built. They have sold and conveyed a large part of them to purchasers in good faith. No interruption of the right was suggested, even, till after such conveyance—in some cases years after.

It shocks the sentiment of good faith for the United States now to demand them by the claim of an unsuspected meaning lurking in words of general reservation, that on their face so plainly relate only to lands previously set apart to other purposes; thus converting what was at first a seeming favor to the State into means to withhold a valuable part of the proposed additional consideration.

It is said this argument begs the question, assuming what is to be decided. Not so. It simply repels by the obvious and overruling considerations which attended the making of the grant the possibility that such an intention was carried by Congress in this reservation as to keep back, through its operation, anything so surely included in the granting clauses, merely to retain it as part of the general public domain. And unless that purpose is to be imputed to Congress, any such reading of the act must be erroneous.

For it is the real purpose of Congress that ought to control, to be ascertained from such sources as satisfy the mind; a purpose not to be refined away by casuistry or ingenuity of argument upon words. Said Mr. Justice BREWER, after quoting from this Court the familiar declaration that a Congressional grant is not less law than conveyance, and effect must be given to its true intent: "We are not limited, therefore, to the technical force and meaning of terms as used in conveyances and contracts between individuals. We must construe this act as any other law of Congress and ascertain from all means at command the intent of the legislator." (*N. P. R. R. Co. vs. St. P. M. & M. Ry. Co.*, 20 Fed. Rep., 557.) And speaking there of a similar claim to restrict the grant for the Northern Pacific road, after summary of the circumstances, declared it "fairer to presume that Congress intended the fullest bounty rather than to believe that it burdened the grant with extra exceptions, which, when construction became feasible, might largely deplete it of value."

The sixth section purports to withhold only lands previously reserved *to* the United States. By what process of just reasoning is it to be held that Congress could by such terms have purposed to keep back lands in no other sense reserved than to ensure the full former grant to the same grantee, while now they added still four sections more to effectuate the same ends, which grant this reservation would go to defeat? How can it be said, except in the ingenuity of mere argument, how in plain and just perception of what was the dealing between these two sovereign governments, that those lands were reserved *to* the United States as *against* the State, which had only been withheld from private entry in order that the State might get the part of them formerly assigned to this same purpose, but because of the insufficiency of which to effect it still more lands were thus given?

Thus to impute to Congress an intention, in this obscure and unsuspected way, of adding a reservation for no purpose except in mere repugnancy to the grant?

Standing, therefore, upon the broad ground of the conditions of the time, the plain objects of the law, as well as its simple and natural reading, it is submitted that the proposition that Congress could thus have intended to keep back lands which they so obviously granted is repulsive not less to our certain perception of their purpose than our sense of fairness and justice.

II.

The intention of Congress to convey by the granting clauses in all three sections of the act of 1864 whatever lands in the indemnity limits of 1856 should be "place" lands under the later grant sufficiently appears from the act itself; from the character of the new provisions made, as well as from the very language employed.

It seems too clear to admit of controversy that it was the the purpose of Congress to substitute the act of 1864 for the act of 1856, as to so much of the road originally projected as would lie northwest of Tomah. It covered by new enactment substantially all the provisions of the earlier act, and made important changes; changes so important as leave it impossible to say the railroads were built under the act of 1856.

1. The continuity of the old line is destroyed and two distinct and independent roads, not even necessarily connect-

ing, were substituted for so much of the distance as lies north of Tomah.

2. Specifically new grants are made, not the old grant enlarged; though "for the same purpose."

3. Under each grant a new line is to be located, by which the grant is to be adjusted, thus giving the State the right to discard the former line; and these new lines need not be connecting or continuous.

4. The coterminous principle, applying adjacent lands only to each twenty-mile section, is introduced.

Not one provision of the act of 1856 is left untouched by the act of 1864, except the provision regarding transportation of mails, and that is probably carried in by the general reference. Either by repetition or change every other feature of the act of 1856 is dealt with by the act of 1864. What could bring the case more clearly within the rule of a revising act?

Doubtless Congress did not intend a technical repeal of the act of 1856, for the reason, perhaps, that as to the road southeast of Tomah it ought to remain operative; and because, also, it was not proposed to recall the lands granted by that act so far as they fell within the grants of 1864.

But it seems indisputable that not only was the act of 1864 substituted as the law of both grants or, more properly speaking, of the entire grant, to aid roads northwest of Tomah, but it was substituted as practically the grant itself for each of the two roads, from Tomah to St. Croix and from St. Croix to Lake Superior.

This is apparent from a single consideration. Suppose a new line were located under either of the first two grants so far distant from the line located under the act of 1856 as that the granted limits of the two were separate and distinct or different by some miles; unquestionably the second location would be controlling and the entire grant be ad-

ministered by it. This, indeed, happened on the line between Tomah and Lake St. Croix, and when the new location was made all the lands in the indemnity limits of the act of 1856 lying beyond the twenty miles were properly restored to market by the Land Department.

This illustrates the meaning of the "deduction" clause. Whatever lands came within the grant of 1856 were to be "deducted" from the grant of 1864; that is, were to be counted as a part of its ten sections to the mile, so that only ten, and not sixteen, sections should in any case be allowed. This could not be put plainer than by Mr. Justice HARLAN in his opinion in the old case of *The Madison and Portage Railroad Company vs. The Treasurer of the State of Wisconsin et als.*, where he said:

"It is, however, contended with much earnestness that the act of 1864, so far from repealing or modifying the act of 1856, recognizes and requires the enforcement of its provisions as to all lands covered by the grant therein contained. But, in my opinion, this position is unauthorized by anything contained in the act of May 5, 1864, and is inconsistent with the evident intention of Congress in making distinct grants for the several roads designated in that act. The grant is of 'every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the act of Congress of June 3, 1856, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin to aid in the construction of railroads in said State, approved June 3, 1856.' It certainly was not the intention of Congress, by the act of May 5, 1864, to grant to the State every alternate odd section 'for ten sections in width on each side of said road,' *in addition* to the alternate odd sections 'for six sections in width on each side' of the roads, granted by the act of June 3, 1856. The purpose of the act of May 5, 1864, was, as to the several roads therein described, to grant the alternate odd sections

for ten sections in width in place of the odd alternate sections for six sections in width, granted by the act of June 3, 1856, and instead of indemnity limits for fifteen miles, as provided in the last-named act, to allow selections of lands within twenty miles of the located line. If, within the place limits, as established and rendered certain under the act of 1864, either by the location of a new route, or by the partial adoption of the route located under the act of 1856, there should be found lands within the place limits, as established under the act of 1856, the title to which had not been earned or become vested, it was intended that such lands be taken as *a part of* the place limits under the act of 1864, and not *in addition* to the alternate sections for ten sections in width, granted by the act of 1864. That is manifestly what is meant by the requirement that the lands granted by the act of 1856 should be *deducted* from the alternate odd sections for ten sections in width granted by the act of 1864. This construction is fortified by the first proviso of section 1 of the act of 1864, which declares that the lands to be located in lieu of lands which had been sold or appropriated by the Government, and which, therefore, could not be used to aid in constructing the railroad, should not be made "in lieu of lands *received* under the said grant of June 3, 1856," but that such location might be made to supply any "*deficiency*" under the grant of June 3, 1856. That is to say, lands granted by the act of 1856, if found, upon the definite location of the respective roads under the act of 1864, to be within the place limits defined by the latter act, were not to be regarded as having been previously appropriated by Congress, so as to entitle a company constructing the road under the act of 1864 to claim other lands in lieu thereof, but they were to be taken as *a part of* the "ten sections in width" granted by the act of 1864. It was, therefore, to be *deducted* from the affirmative grant of ten sections in width made in 1864. The word "deducting" was not, perhaps, the very best one to express the intention of Congress, but that Congress intended what I have indicated is reasonably clear."

(The italics are Mr. Justice HARLAN'S.)

And see *Grinnell vs. Railroad Co.*, 103 U. S., 743, where this Court intimates its view would be the same in such a case.

We readily see in the provision for two roads northwest of Tomah instead of one, with authority to locate new routes for both, why the new grants of ten sections were made instead of simply increasing the old grant from six to ten sections per mile, as was done with the grants to Michigan and to Minnesota by the same Congress (13 Stat., 520 to 526); as well as the need and the office of the "deduction" clause.

Wherein, then, does the act of 1864 differ from what it would have been if written that, by consent of the State, the grant of 1856 so far as related to the road northwest of Tomah was recalled, and three grants instead given of ten sections each for the three independent roads named? It seems reasonably clear that nothing different in substance was really meant, although, not unnaturally, the act was so written as to preserve to the State what had already been granted. The State assenting, and no rights of others intervening to prevent, as none did, this could be done without let or difficulty.

This reading of the act of 1864, if correct, too obviously destroys the theory of intention in Congress to withhold the indemnity limits of the act of 1856 from the operation of the grants of 1864 by virtue of the reservation in the sixth section, to need addition. If this reading be correct, the three grants were grants according to their terms, all *in præsenti*, each with equal power with the others; and all took effect as of the same date, so far superseding, and thus so far repealing, the act of 1856.

It is, indeed, argued that if this revision of so much of the act of 1856 as related to the Bayfield road is to have the effect of repeal, yet that would not revoke the withdrawal

of the indemnity limits of the act of 1856 made by the Land Office. There is no need to play upon words. The power of Congress to dispose at its pleasure of lands withdrawn from market by an executive department has been often decided and is open to no doubt. The question here does not turn upon the terms used. It is simply, what was the design of Congress? And when it is seen that the purpose was to substitute a new grant for a part of the old projected line, with new law for its administration, retaining the former grant only as a part of the new one because within the same territory, it is too unreasonable to assert that this purpose is to be thwarted or impaired by the fact of a withdrawal long before merely to secure the first grant, to require refutation. The withdrawal was a mere incident, and as such went with the principal thing, the former act. If Congress meant to convey to the State by the granting clauses in the three sections of the act of 1864 such of the lands in the old indemity limits as lay within the ten-mile limits of the three roads they did convey them; and it in no manner detracts from the force of the conveyance that they did not in terms revoke the withrawal. It was in their power to convey by whatever words or form they chose, regardless of the withdrawal.

But irrespective of the question of repeal, the understanding of Congress that the granting clauses applied to and conveyed lands in the indemnity limits of 1856 seems to stand out very clearly in the proviso at the end of the first and of the second sections. Each contains the "deduction" as part of the granting clause; then adds the usual indemnity selection clause; after which comes the proviso: "*Provided*, that the lands to be so located shall in no case be further than twenty miles from the line of said road, nor shall such selection or location be made in lieu of lands *received* under the said grant of June three, eighteen hundred and

fifty-six, *but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency* under the said grant of June three, eighteen hundred and fifty-six, should any such deficiency exist."

This explicitly allows selections for deficiencies in any section purporting to be granted in 1856 from the full twenty-mile limits of the lines of 1864. Why was this done, except because the new grant appropriated a part of the former indemnity lands by converting them into "place" lands? Is it to be supposed that Congress not only preserved by the reservation in the sixth section the full former indemnity limits of nine miles, but in excessive anxiety to make up the first six sections, also added this further opportunity for selection out of the limits appropriated to the later grant?

The meaning appears to be easy of apprehension. Such odd-numbered sections as, lying within the grant under the act of 1864, were also within the six sections adjacent to the route of 1856, were to be reckoned a part of the ten sections granted and were not to be considered as "sold, reserved or otherwise disposed of," so as to authorize selections in their stead as for deficiences under the grant of 1864. But, such of them as the State had *received* (that is, found not sold or subjected to pre-emption rights prior to the attaching of the grant of 1856), should be reckoned as part of the ten sections; and for such as had been lost by prior sale or pre-emption, selection should be made in the new and enlarged limits between ten and twenty miles as other selections under the act of 1864 might be; a thing necessary to say only if Congress considered the old indemnity limits gone into the new grant. Thus the new grant could be applied to and administered upon a new route, if a new one should be found desirable, or equally as well upon the old, or upon one partly variant only, as was most probable; in either case

with recognition and acceptance of what had formerly been given, while in the aggregate only the ten sections a mile adjacent to the new route, or their equivalent in indemnity, should be taken. It is language naturally employed to express the idea of an increase of the grant to ten sections, without recalling the former grant, while at the same time provision was made for any change in location of the line which should be found desirable.

It follows inevitably that the Congress meant to convey at once by the grant *in præsenti* any odd-numbered sections lying within the indemnity limits of 1856; and did not mean that such sections could only be taken by the State by selection as indemnities for deficient sections under the earlier grant, which theory simply confounds the sense of the granting clauses in the act of 1864.

The reservation in the sixth section requires to be read in the light of this obvious purpose. Employing general words usually to be found in these grants, it is there written that "all lands reserved to the United States by any *act of Congress* for the purpose of aiding in any object of internal improvement * * * are hereby reserved and excluded from the operation of this act," etc. Applying this language to the act of 1856, it clearly is limited, and on all hands so conceded, to the lands within the adjacent six sections of that line, the "place" lands, which are reserved *and excluded* in entire harmony with the "deduction" clause in the grants made in 1864; and the introduction of the words "and excluded," words peculiar to this act, seems to mark in an especial way this understanding, at the time, of what was written.

But, since the particular attention and care of Congress were thus bestowed on this point of what was intended to be reserved and excluded under the former act, is it admis-

sible to charge a further purpose to exclude also the indemnity limits of that grant, nine miles wide, *without words of particular mention? Expressio unius exclusio alterius.* (See opinion of BREWER, J., cited *supra*, 26 Fed. Rep., on p. 558.)

The force of this argument is augmented by considering the further words employed within which it is claimed to bring such reservation. After providing for the reservation of lands "for the purpose of aiding in any object of internal improvement" as one to have been made "by any *act of Congress*" and not otherwise, are added the words "or in any manner for any purpose whatever." The primary natural inference is that this was to provide for reservations *to* the United States for *some other purpose;* a conclusion strengthened by the fact that four Indian reservations lay within the probable range of these grants; besides, perhaps, other lands held for Federal uses.

How, then, can it be fairly said that the Congress by this language had it in design to withhold from the grant *for no special purpose whatever*, but simply to keep as part of the public domain open to sale or entry, any such lands merely because they had been formerly withdrawn to enable the same grantee to make up but six sections to the mile?

Another line of argument strongly reinforces the same conclusion. It is obvious that upon the face of the act of 1864 the sixth section is as definitely and surely applied to the grants in the first and second sections as to that in the third, and with equal force and meaning to all alike.

If, then, by its words of reservation it was intended to prevent the application of the granting clauses to lands in the indemnity limits of 1856, and to withhold to the United States for restoration to market all lands in those limits

except what should be selected to make good the six sections to the mile of the line of 1856, singular consequences must be charged to the design of Congress. First, whenever the new line coincided with the old location the grant of ten sections would be inoperative as a grant *in præsenti*, and effective only to authorize selections to fill it from lands more than fifteen miles distant from the line of road; secondly, but five miles in breadth of territory would thus remain to entirely supply four sections, equivalent to four "place" sections and but one indemnity tier of sections, although the act evidently purposes indemnity limits equal to the place lands in extent; and, thirdly, it would be certain that many valuable sections and parts of sections would revert for restoration to market between six and fifteen miles, while selections would take all between fifteen and twenty miles, and still leave large deficiencies in all the grants which Congress professed to increase by four sections to the mile.

In short, this theory of reservation is in such obvious repugnancy to the act of 1864, when applied to the first two sections, as to be preposterous.

This is recognized by the opinion filed at the circuit, in which it is said that under the first section "it converted four miles of indemnity limits, as defined in the act of 1856, into place limits of the road to Bayfield, and added five miles on each side of the place limits thus enlarged to the indemnity limits." Undoubtedly; it is the natural, obvious and just reading of the grant; and results because the old line to Bayfield was substantially adopted as the new line under the new grant; though this was an accident of location not required by the law. Thus, however, it is held that the granting clauses mean what they say. But why, if the reservation in the sixth section was designed to prevent the granting clauses from conveying lands withdrawn

from sale or entry, and to restore again to market all such lands as were not selected by the State to make good deficiencies in the six sections to the mile under the act of 1856?

It can be upon but one theory; it is, in fact, based upon but this one; that the reservation in the sixth section, though in terms equally addressed to all, was meant by Congress to affect differently *the same class of lands* when applied to the granting clause of the third section, so as to exclude them from that grant, but not to exclude them from the first two.

Thus, when analyzed, this is the turning point of the opinion in the court below. Unless this proposition can be maintained, that opinion has itself recognized that the reservation in the sixth section was not intended to exclude lands in the indemnity limits from the grants *in præsenti* in the earlier part of the act; and clearly, for the reasons given, it must be so held.

This justifies a careful attention to the point; and it is respectfully submitted that, though the consequences of the new theory of interpretation when limited to the third section's grant be less extensively destructive, and therefore the error be less flagrantly manifest, yet it does no less violence to the language and purposes of Congress and is in nature, though not in degree, no less unjust.

First, it is undeniable that upon the face of the act the sixth section relates to all three of the preceding sections and affects each and all of them in the same way and with the same force. Not a line or word of the act suggests, much less warrants, the theory that anything is by the sixth section intended to be reserved from the third section's grant, which is not likewise, and to the same extent, reserved from the others. Of course, if reservations to the United States

for one purpose were found within the limits of one grant, as an Indian reservation, and in another grant for another purpose, as a military post, for example, then in one sense a different reservation would be made upon the different granting clauses. This would be, however, the accident of application. For equally from each and all grants, both Indian reservations and lands appropriated for military purposes were reserved.

But to say that Congress meant to reserve lands of precisely the same class and description from one grant and not from the others *wholly and entirely* by force of the same words, "reserved to the United States" * * * "in any manner for any purpose whatever," is arbitrarily to import a limitation of the meaning in one case, or an extension of it in the other, which Congress cannot be accused of. It violates the familiar rule of interpretation that general words must have their general meaning awarded them, and exceptions cannot be imported where no exception is made by the legislature. It is to interpret when no interpretation is needed; when there is no room for construction.

Secondly. This theory is especially unwarranted in the particular circumstances of this case. It assumes that Congress had in mind the indemnity limits of the grant of 1856 and the withdrawal of those lands from market by the General Land Office, and deliberately used these words of reservation with understanding that they did *not* reserve such lands from the words of grant in the first and second sections; but on the contrary, because they did not, Congress provided an additional range of selection to make good the deficiencies which might be found in the six sections granted by the act of 1856. Is it not, then, inconceivable that Congress, if they did also intend that such reservation should apply to exactly the same words of grant in the third section so as to exclude by its force precisely the same lands that

were not to be excluded by it from the grants in the first and second sections, should fail to express with pains a difference in purpose so contradictory, and yet which any one must know would be discovered, if at all, with the greatest difficulty from the language employed? Is it fair to a sovereign grantee like a State of the Union so to discover two utterly different and contradictory meanings in the same words applied to the same subject in a Congressional grant proffered to induce the construction of a work of internal improvement?

But the extraordinary injustice of this doubleness of interpretation is not thus yet entirely set out. If the purpose of Congress was not to exclude the indemnity limits from the first two grants, as has been established and is conceded, then it not only shows Congress did not regard or intend to rely on the withdrawal formerly made for that purpose, and for that reason made the additional provision for selections; but it must necessarily happen, as it has happened, that *the only force and effect* of the reservation when applied to the third section's grant, would be and is to exclude lands *which were not needed to make good the deficiencies* under the act of 1856, and thus to withhold such lands from this grant to the mere end of restoring them to the public domain. I ask again, is it conceivable that Congress purposed such a duplicity of meaning in the same words, both of conveyance and of reservation, applied to the same lands in a grant to a State of the Union? And still more, is it imputable that such lands were designed to be withheld for *no* purpose under words reserving only such as had been appropriated to the United States for some particular purpose? Thus, merely to cripple and impair the strength of the inducement proposed now for the first time to invite the construction of this new line of desired communication, the grant for which was from the beginning, at best, greatly deficient.

Thirdly. It cannot but be thought that such an interpretation which so varies the meaning of words when applied to one section or the other ought to find striking support in other parts of the act for its justification; something else than the mere words, something which can leave no doubt of their unfortunate use to express the true intention. Do we find it?

It is respectfully submitted that there is not a word in the act which can justly have that effect. All three grants are alike in terms and force, and no mention of or reference to the act of 1856 requires it, but rather tends to the contrary.

The first is the "deduction" clause which, it is plain and is agreed, relates only to the place lands of the grant of 1856.

The next reference to that act is in the declaration that this grant is "upon the same terms and conditions." But those words are also in the third section and affect its grant precisely as they do the others. They can have little operation unless to import into the act of 1864 the provision in respect to transporation of the mails, every other "term or condition" being explicitly changed or re-enacted, as has been seen.

Next comes the provision that selection shall not be made in lieu of lands *received* under the act of 1856, but may be made in the enlarged limits for its deficiences; which has been sufficiently discussed, and leads the mind strongly against the proposed theory of interpretation.

Finally, the time of building the road under the first two sections, as limited in the act of 1856, is extended to five years from the date of the act of 1864, while ten years is given to build the road provided for in the third section. This tends to show Congressional favor to the later, instead of a purpose to defeat the project by crippling the grant.

While it does, doubtless, put the roads "upon a different footing as to time," the difference is not one which marks a purpose to impair the chances of construction of the central road.

With great deference, it is respectfully submitted that the opinion given in the court below proceeds upon a mistaken postulate, which led to the conclusion arrived at. It is disclosed in these words quoted from that opinion: "The sixth section should receive the same construction precisely that would be given if it had been simply a proviso of the third section. It is as if Congress had declared in words 'We give to the State for the benefit of the road to be constructed from Portage City, Berlin, Doty's Island or Fond du Lac, in a northwestern direction to Bayfield, thence to Superior, on Lake Superior, every alternate section of public land designated by odd numbers for ten miles — sections in width on each side of the road except or excluding such lands within those limits as were reserved to the United States in any manner for any purpose whatever.'"

Record, Fol. 148.

And upon that postulate it is argued that as the prior grant was to remain in full force and effect, the grant in the third section is to be treated as a later grant, and the question to be determined is whether the order of withdrawal (spoken of as made by the Secretary of the Interior instead of the Commissioner of the General Land Office), should be regarded as a reservation to the United States within the meaning of the proviso, as if attached alone to the third section. The question is thus treated as one between different companies only; as if it were which held the elder grant; which entitled to priority.

But to treat the sixth section as if it were affixed as a proviso to the third section and nothing more, especially if it is to be also treated as if no proviso to the first section, is to treat it differently from the way in which Congress wrote it. Congress did not say, "reserved and excluded from the operation of" the third section of this act; but "reserved and excluded from the operation of *this act;*" and thus explicitly excluded from all the grants whatever was reserved from any. Nothing can more directly illustrate the violence of the fundamental assumption of this proposed interpretation. But it has already been argued.

So, while it is true that the grant of 1856 was not recalled, yet it is believed the argument is convincing that the act of 1864 was substituted for it, and the grant of 1856 retained only as a part of the later one, to be administered by the law of the later grant. And, therefore, although the grant of the six sections of 1856 was prior in original bestowal, the act of 1864 plainly manifests that no priority of right or advantage was intended to be given the road to be constructed by aid of its first section's grant, including as a part of it the grant of 1856, over the road to be built by aid of the third section's grant. To aid the road to Bayfield, the grant in the first section included the previous grant of 1856 simply because it was for the same purpose, and Congress did not intend two grants, but one, and so expressed their design. It was not done to award that road any priority of right. To illustrate: Suppose there had been no prior grant and the first section had been, therefore, written wholly in the same words as the third, would any one contend that there was any priority of right as between the grants made by the two? Obviously not. The exact point has been often decided. (*S. C. & St. P. R. Co. vs. W. & St. P. R. Co.*, 112 U. S., 720; *S. C. & St. P. R. Co. vs. C. M. & St. P. Ry. Co.*, 117 U. S., 406.) The opinion

below seems to recognize this, for, while distinguishing as *obiter* the remarks to that effect in the former case of the Madison and Portage Company, it says there would still be ground for holding that the two grants wherever overlapping were to be administered as a tenancy in common, but for the sixth section; with its destructive effect when limited as a mere proviso to the third.

It therefore stands confessedly clear that the grant in the first section was not designed to have any priority in location, nor was it purposed to subordinate the chances of building the new road provided for in the third section to the construction of the first. In other words, no priority of right or advantage was, by the act of 1864, intended to be given either of the grants contained in it, but all took equally from the date of the act. None such would be supposed but for the reservation in the sixth section being treated simply as a proviso to the third section, and therefore the reservation in the sixth section is to be read simply as a proviso to the third section. Is not this reasoning in a circle?

Is not the natural reading of this act of 1864 perfectly clear? That Congress proposed three new grants for three separate and distinct roads, each grant dating from the same time and possessing equal rights with both the others? It is, then, to be justly held that Congress designed the road for which the grant in the first section was made should have no priority over the other, but that the road which the old grant of 1856 was to aid should have priority, both being *one and the same?* Or, in another form, that Congress designed that to make up the six sections to the mile of road to be built under the first section a reservation should be made so rigorously that whatever was not required therefor should revert to the public domain, but that, as to

the remaining four sections, *though for the same road*, there should be no priority or advantage.

It is respectfully submitted that this act of 1864 is subject to no such difficulty of understanding as to require such subtleties of interpretation as this new theory demands. Its meaning is not so obscure that the same words must be given two senses, utterly contradictory of each other, when applied to the same identical subject. There is no necessity for maintaining that words of reservation explicity declared to apply to the whole act shall be held to apply to only one of three grants in it. No demand is upon us to say that of three grants of the same date, all obviously intended to be equal in time and vigor, one shall be held later than another and subordinate in right.

And what occasion arises otherwise for confounding by construction the plain and manifest purpose of Congress to induce the State of Wisconsin to build, or cause to be built, these much-desired roads by the gift of the adjacent lands in the odd-numbered sections for ten miles on either side?

Is there any such overpowering demand of justice as compels us to distort the words and overthrow the plan of this act of 1864, in order to withhold to the public domain some part of the lands which, upon its face, and from every circumstance attending the transaction at the time, are so plainly seen to have been within the scope and design of the grant?

There is nothing in any of the former judgments of this Court which controverts the argument submitted; but much which supports it.

Yet the search for the intention of Congress in its act of

1864 will naturally find less aid from former judgments, because that act is peculiar to itself, and the circumstances inducing its enactment were different from others.

The proponents of the late-discovered theory of reservation have relied mainly upon the resolution of this Court in the Des Moines River case, which first held a body of lands spoken of as withdrawn from market to be referred to by Congress as a reservation. Yet one has as little difficulty in perceiving that Congress must then have intended to except lands long before set apart as the specific place lands of an earlier grant as here to find an intention of excepting the indemnity limits of a revised grant. There the lands in question, although lying above the Raccoon Fork, had been not only once withdrawn from market, but in great part, if not all, certified to the State as granted for the Des Moines River improvement; the State had granted them to the Des Moines River Improvement Company, that company sold to numerous settlers whose just claims, if the title failed, Congress desired to protect and subsequently did confirm. It had been repeatedly held by different executive officers that the grant extended above the Raccoon Fork, although the question was serious and doubtful. The proviso was directly to the grant in the later act, and the peculiar arrangement of its words suggests the obvious purpose of Congress, as their contrast in the reservation under consideration marks the contrary. Here it is, "lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatever." In the Iowa case it was "lands heretofore reserved to the United States by any act of Congress, *or* in any other manner by competent authority for the purpose of aiding in any object of internal improvement, or for any purpose whatever."

The Court well said then, after setting forth the long history of the controversy, the conflicting action of executive officers finally resulting in certifying the grant to the State, and the *subsequent* action of Congress itself in regranting to the State so that the title inured to the benefit of the grantees of the State, and the Improvement Company: "The question turns upon the construction of the proviso. And in reading it in connection with the act of 1846, granting lands to the State of Iowa for the improvement of the Des Moines River, and in connection with the serious and prolonged conflict of opinion that arose among the executive officers of the Government, extending over a period of some eight years, and which related to the title above the Raccoon Fork, in respect of which this act of 1856 was dealing in the grant for the benefit of the railroads, we think it difficult to resist the conclusion that Congress in the passage of the proviso had *specially in their minds* this previous grant and conflict of opinion concerning it, and intended to reserve the lands for further disposition if the title under the first grant should turn out to be defective. The decision of this Court had not then taken place, though the litigation was probably pending in the court below, in the District of Iowa."

It is probable, indeed, that even without such reservation, the lands above the Raccoon Fork would have been held not included in the railroad grant, because *sub judice;* as within the rule determined in the cases of

Newhall vs. Sanger, 92 U. S., 761;
Doolan vs. Carr, 125 Id., 618;
United States vs. McLaughlin, 127 Id., 428.

It was, in short, not the withdrawal from market so much as all the circumstances attending that made it clear the former grant was intended to be reserved from the railroad grant.

It is different here, not only in the general circumstances, but in the fact that there were four Indian reservations and perhaps other specially appropriated lands to which the reservation extended; and also in its general use, as equally applicable to all three of the several grants made by the act. It was not inserted because Congress had any exception "specially in their minds," as in the Iowa grant, but in due prudence for general preservation of any lands which the United States might have set apart by appropriation to some particular Federal use, for which they should be retained in Federal ownership. Here all attendant circumstances, upon which such stress was laid in the Des Moines case to show the intention of Congress to reserve, as strongly show the purpose not to reserve.

Besides, the present question is entirely different. There it was whether the former grant, its particular place lands, were reserved. Here the place lands were explicitly reserved and "deducted"; and if Congress had meant the indemnity lands beside, they would have been equally explicit in mention of them. The reasoning of the Des Moines River case in all essentials when applied to the conditions of this seems to satisfactorily show the intention of Congress should be recognized and accepted as it was taken from the beginning.

There is nothing in any of the cases adjudged after the Wolcott case, in the successive stages of that controversy, which requires mention in this connection. All constitute but the determination, oft repeated, of the same question.

Reference is also made to the case of *Nor. Pac. R. Co. vs. St. P. M. & M. Ry. Co.*, 26 Fed. Rep., 557, as if a support to the interpretation claimed. But there the sixth section of the act of July 2, 1864, the prior grant, itself declared the reservation of the lands granted, so soon as the preliminary

line should be located, and the question was not of the effect of the withdrawal, but whether the withdrawal was valid so as to enjoy that effect. It was also the place limits only which were so withheld. The quotation made in an earlier part of this argument shows that case a support to the principles here contended for, and is relied upon.

The case of *United States vs. M. K. & T. Ry. Co.*, 141 U. S., 358, though cited by defendant, appears also to have no bearing on the particular inquiry here. The provision in the Leavenworth, Lawrence and Galveston granting act of 1863, directing that the even-numbered sections remaining to the United States in the place limits "shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: *Provided*, that actual and *bona fide* settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: *And provided, also*, that settlers on any of said reserved sections under the provisions of the homestead law, who improve, occupy and cultivate the same for a period of five years and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding," was held to reserve to the United States for the special purposes named, such even-numbered sections within the place limits, but not to reserve them within the indemnity limits. It was like the preceding, a reservation by act of Congress.

No other judgments are claimed by the defendant's counsel to serve as precedents for this interpretation; and it thus

appears that, in truth, there is no precedent whatever for the demand so to impair the grant. To state this more in accordance with the exigency for precedent, no case is found in the reports in which the withdrawal of indemnity limits, to afford an opportunity for selections, has been considered a reservation of such lands to the United States, within the meaning of an excepting clause. The judgment below enjoys the distinction of first of its kind.

But, on the contrary, this Court has already gone far to determine if the full conclusion may not indeed be said to have been reached, that lands in the indemnity limits enjoy no advantage as a reservation, even if withdrawn from market to secure enjoyment of the right of selection. Repeated judgments have settled the doctrine that the indemnity territory is a mere float, to which no title or vested right attaches until the actual selection, with departmental approval, of specific lands is made in lieu of other specific lands lost in the place limits by reason of some prior sale, disposal, appropriation, pre-emption or homestead right, which put the lands outside the grant.

Ryan vs. Railroad Co., 99 U. S., 382;
Grinnell vs. Railroad Co., 103 Id., 739;
Cedar Rapids Railroad Co. vs. Herring, 110 Id., 27;
K. P. R. Co. vs. A. T. & S. F. Co., 112 Id., 414;
St. P. R. Co. vs. W. R. Co., Ibid., 720;
S. C. & St. P. R. Co. vs. C. M. & St. P. R. Co., 117 Id., 406;
U. S. vs. McLaughlin, 127 Id., 455;
Wis. C. R. Co. vs. Price Co., 133 Id., 509.

In the case of the *St. Paul Railroad vs. Winona Railroad*, 112 U. S., 720, the former claimed lands within a similar indemnity limit of fifteen miles of the Winona grant, made in 1857. This Court decided the right to depend upon the priority of selection made by the Winona Company. Un-

doubtedly there was a withdrawal as in this case; but the Court gives no heed to it as affecting the right, although conclusive of it if the principle of the judgment below be sound.

III.

However confidently counsel may rest upon the force of the foregoing reasons as demonstrating that the sixth section of the act of 1864 was not intended to reserve or exclude the indemnity limits of 1856 from the later grants, it remains a duty to point out that even if extended thereto, its force would not go beyond the purposes and object of the reservation.

It cannot but be acknowledged that the design of Congress to give to the State ten sections to the mile, if so much undisposed of land of the Government was to be found, is the manifestly primary and superior feature of the act of 1864. There is nothing to warrant the idea that the Congress entertained a thought of withholding any part of such sections merely for the public domain. If, therefore, it were to be also found through the limitation of this sixth section as a mere proviso to the third, that it was further designed to secure the full quantity of six sections to the mile granted by the act of 1856 before applying the grants of 1864, still, a just construction of the grant should harmonize that lesser purpose with the obviously principal plan. This is to be done in accord with settled principles by limiting the extent of the reservation to the lands which,

in fact, were required for the grant of 1856, and so applied. To that extent, at the utmost, were they appropriated or reserved in the design of Congress.

The right of selection given by the act of 1856 was a float, the grant "of a certain quantity of land to be located within the limits of a larger area." (127 U. S., 448.) And this Court has settled the rule that whenever such floats are to be excepted from grants to aid railroads, "only so much land within the outboundaries as is necessary to cover the specific quantity granted was excluded from the grant to the railroad companies."

Doolan vs. Carr, 125 U. S., 618.
United States vs. McLaughlin, 127 Id., 428.

It is said that this is inconsistent with the reservation which withholds *any* and *all* lands reserved. But that begs the question. No lands were reserved except such as were required to supply deficiencies in the grant of 1856. The reservation does not go beyond the right. The withdrawal merely secured the outboundaries within which the reserved lands were to be taken.

So it is said that this is inconsistent with the doctrine of *K. P. R. W. Co. vs. Dunmeyer*, 113 U. S., 629, and other like cases, which have decided that when a pre-emption or homestead right had attached to a specific section or part of section at the date of grant, it did not pass by the grant, although subsequently the right of the pre-emption or homestead claimant to perfect his claim was abandoned or failed. The difference is obvious. The grant in every such case does not purport to cover or convey the land, but in express terms such land is not granted. It is not withheld from a purported grant by exception. In terms it is not granted. The piece of land is also specifically defined and described, and the object of Congress was to forbid to the utmost possible the chance of litigation between the

settler and the railroad company. Here the land was conveyed by the granting clause, and the question is of what land was reserved from a float which much exceeded in quantity the object of reservation or the right of selection.

The language "reserved *to* the United States" is apt to show that Congress intended to withhold from the State no part of what was set apart for the State. None of this land was required by the United States for any Federal purpose unless to promote the building of these roads.

Every public purpose is perfectly subserved, every design of Congress in this legislation, even granting that Congress had in mind the double meaning sought to be affixed to the sixth section, by thus pursuing the established rule of exception in case of a float.

And what is of more import still, the shocking theory that Congress planned deliberately to withhold for no purpose but to keep out of the purported grant lands which by its terms were manifestly proffered to the State to induce building of this road, will receive no sanction from this great tribunal; nor will the consequent injury to numerous citizens who have bought and sold upon a title of such seeming perfection be so unjustly inflicted.

WILLIAM F. VILAS,
Of Counsel.

Office Supreme Court, U. S.
FILED.
JAN 30 1895
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

TERM No. 238.

THE WISCONSIN CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

WILLIAM O. FORSYTHE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

GEO. G. GREENE,
Attorney for Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

SUPREME COURT OF THE UNITED STATES.

THE WISCONSIN CENTRAL RAILROAD COMPANY,
Plaintiff in Error,

vs.

WILLIAM O. FORSYTHE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The first section of the Act of Congress of June 3, 1856 (11 U. S. Stat., 21), provides: "There is hereby granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to the Saint Croix River or Lake, between townships 25 and 31, and thence to the west end of Lake Superior; and to Bayfield * * * every alternate section of land designated by odd numbers, for six sections in width, on each side of said roads, respectively." It further provided that, if at the time the routes of said roads should be definitely fixed, any of the land thus granted had been sold or pre-empted, the State might select, in lieu thereof, land in alternate sections within fifteen miles of the line of road, equal to the lands thus sold or pre-empted.

The roads designated were duly built, and the State duly transferred the grant to the companies that built them, pursuant to the Act. The grant ultimately vested in the Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereinafter called the Omaha Company, which now owns and operates the roads.

The maps of definite location of all the roads referred to in the Act were filed by July 17, 1858; and on and prior to March 1, 1859, all the land within the odd sections within fifteen miles of the lines thus fixed were duly reserved by executive withdrawal from entry or sale (pp. 18 to 20, print. rec.)

The first section of the Act of May 5, 1864 (13 U. S. Stat., 66), increases the place limits of the grant of 1856 from six to ten miles, and the indemnity limits from fifteen to twenty miles. The third section provides: "There is hereby granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior on Lake Superior, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road." It gave right to indemnity for lands not found in place, at the time of definite location, within twenty miles.

The road mentioned in the third section of the Act of 1864 was built, and the grant was transferred to the company that built it, of which company the plaintiff in error is the successor.

The land in controversy is within the ten miles granted limits of the plaintiff in error, under section three of the Act of 1864, and between the enlarged grant limits of the Omaha Company, under section one of that Act, and its fifteen miles indemnity limits fixed by the Act of 1856. It is, therefore, within the indemnity withdrawal in aid of the grant of 1856. That withdrawal was not revoked until August 15, 1887. *In re Indemnity Withdrawals*, 6 Dec. Dep. Int., 77–92. The land was never selected for indemnity by the Omaha Company, and, after revocation of the withdrawal, the defendant in error entered it as a homestead (p. 82, print. rec.)

The plaintiff in error claims that the land was granted to it by section three of the Act of 1864. The defendant in error claims that the land was excepted from such grant by the sixth section of that Act, which provides: "That *any* and *all* lands reserved to the United States by any Act of Congress, for the purpose of aiding in any object of internal improvement, or in *any* manner for *any* purpose *whatsoever*, and all mineral lands, be and the same are hereby reserved and excluded from the operation of this Act." Since the land in suit was, at the date of this Act, within the executive withdrawal, it is excluded from the grant of section three by the exception of section six, if such withdrawal was *valid*, a *reservation* within the intent of the exception, and *unrevoked* by the Act of 1864.

I.

The order of withdrawal was valid.

The withdrawal, in legal effect, was by the President, in execution of the Act of 1856. "Such an order," the court

said, in *Wolsey vs. Chapman*, 101 U. S., 755, "is the legal equivalent of the President's own order to the same effect." The building of the railroads named in the Act of 1856, was the object and justification of its grant. The act secures their free use to the government forever, and makes them public highways (Sec. 4).

Ry. Co. vs. United States, 92 U. S., 733.
Ry. Co. vs. Ry. Co., 26 Fed. Rep., 558.

To induce their construction, Congress intended to grant as much public land as the odd sections in the place limits contained, if it could be found within the place and indemnity limits together. If, on definite location, there should be, as there always is, great deficiency in the granted lands, the indemnity lands might be the only sufficient inducement to build. But they would afford no inducement unless reserved. If subject to entry or grant, they might all be disposed of when the right of selection for indemnity should accrue, while the roads were being built and the grant adjusted. The grant, therefore, "carried along with it by necessary implication, not only the power but the duty of the Land Office, to reserve from sale the lands embraced in the grant."

Wolcott vs. Des Moines Nav. Co., 5 Wall., 689.
Wolsey vs. Chapman, 101 U. S., 755.
Schullenberg vs. Harriman, 21 Wall., 44.
Ry. Co. vs. United States, 118 U. S., 682.

Such withdrawals have been made and sustained by the Land Department for more than forty years.

In re Ry. Co. vs. Pressy, 2 Dec. Dep. Int., 551.
Greenlaugh vs. Ry. Co., 5 Dec. Dep. Int., 565.
In re Omaha Company, 6 Dec. Dep. Int., 195.
Ry. Co. vs. Boardman, 7 Dec. Dep. Int., 56.
Consterman vs. Ry. Co., 8 Dec. Dep. Int., 237.
In re Wis. Cent. Ry. Co., 10 Dec. Dep. Int., 63.

II.

The withdrawal was a reservation within the meaning of Section six of the Act of 1864.

The exception of section six is of "*any* and *all* lands reserved to the United States * * * in *any* manner for *any* purpose *whatsoever*." A reservation by withdrawal in aid of another grant is as clearly within the reason as the letter of the exception. *In re Missouri, etc., Ry. Co.*, 4 Dec. Dep.

Int., 573. Secretary Lamar gives the genesis of this exception, which is common to such Acts. It was generalized and formulated in view of the multitude of public grants, to save lands devoted to one public improvement or purpose from the operation of subsequent grants for others. *U. S. vs. Missouri, etc., Ry. Co.*, 141 U. S., 358. An indemnity withdrawal is within this reason. Granted lands do not need the exception; but indemnity lands, which may be the only sufficient inducement to make the improvement, may be so diverted by subsequent grants as to defeat it. That the exception was intended to be as universal as its letter imports, is shown by section three. It gives indemnity for *all* reserved lands in the place limits; necessarily implying that all such lands were excluded from the grant.

It is said the right to indemnity is a "barren right." But it is only termed barren after the government has practically defeated it, as it may do, by disposing of the land before selection. The authorities which term it "barren" say that it is founded on the promise of the government, unenforceable by the courts. But, in fairness, the right should not be defeated or disregarded, without the fault of the grantee; and, hence, the government seeks to protect it by these reservations and exceptions. It is to prevent its becoming "barren," thereby imperilling the construction of the improvement, that the executive department guards it by withdrawals, and Congress preserves it against subsequent grants by such exceptions.

This court has put this question at rest. In *Wolcott vs. Des Moines Nav. Co.*, 5 Wall., 689, it was held that this very exception excluded substantially the same reservation from the grant. For more than twenty years that decision has been followed and reasserted in numerous cases, and it has continually guided the Land Department in the adjustment of such grants.

Williams vs. Baker, 17 Wall., 144.
Homestead Co. vs. Ry. Co., 17 Wall., 153.
Wolsey vs. Chapman, 101 U. S., 755.
Ry. Co. vs. Ry. Co., 109 U. S., 329.
Bullard vs. Ry. Co., 122 U. S., 107.
The Omaha Case, 6 Dec. D. I., 195.
The Wis. Cent. Ry. Co., 10 Dec. D. I., 63.
Ry. Co. vs. Ry. Co., 26 Fed. Rep., 551, 561.
U. S. vs. Missouri, etc., Ry., 141 U. S., 358.

The Wolcott case cannot be distinguished from this. The lands there withdrawn were supposed granted lands. But, if the withdrawal is *valid*, any classification of the land

reserved as granted or indemnity lands, does not go to the fact of reservation, which is the sole condition of the exception. That case rules that lands *legally reserved* by such an order, are excluded from such a grant by such an exception. Mr. Justice Brewer, while circuit judge, in *Ry. Co. vs. Ry. Co.*, 26 Fed. Rep., 561, applied the doctrine of the Wolcott case to an indemnity withdrawal and exception, identical with those here involved. And Mr. Justice Lamar, while Secretary of the Interior, in the *Omaha Case*, 6 Dec. D. I., 195 (pp. 37–43, printed rec.), applied it to this very reservation and exception. He said: "The rule that lands reserved, or otherwise disposed of, are not to be considered as included in a subsequent grant by Congress, is as old as the land system itself; as is too firmly settled through a long line of decisions by the Supreme Court, to permit of any question at this late day, and it would be a waste of time to quote authorities to sustain an assertion that ought not to be questioned." After citing the Wolcott case, he continues: "Since this decision was announced in 1866, the court has specially affirmed it in some half dozen or more cases, in which the question was presented under different aspects. Besides, the same case and the doctrines therein enunciated have been incidentally affirmed in innumerable other cases, and I find nothing in conflict therewith. I must, therefore, hold that the lands within the fifteen miles of the withdrawal, under the Act of 1856, were reserved from the grant under the Act of 1864, in favor of the Wisconsin Central Company, and that the Omaha Company is entitled to the whole of the designated sections, within the six miles limits, and to be indemnified for losses therein, out of the designated sections within the fifteen miles limits, to the exclusion of the other Company, as fully as though the grant to it had never been made." The Central Company demanded a re-hearing of this question before Secretary Noble, on an application for patents to these same lands. It was granted, and, after full discussion, Secretary Noble, in an elaborate opinion, followed the decision of Secretary Lamar. *In re Wis. Cent. Ry. Co.*, 10 Dec. Dep. Int. (p. 59, print. rec.)

Of such decisions this court, in *Ry. Co. vs. Whitney*, 10 Sup. Ct. Rep., 115, said: "It is true that the decisions of the Land Department on matters of law are not binding upon this court, in any sense. But, on questions similar to the one involved in this case [the effect of such exceptions], they are entitled to great respect at the hands of any court."

Brown vs. U. S., 113 U. S., 568, 571.
U. S. vs. Ry. Co., 98 U. S., 354.
Ry. Co. vs. Ry. Co., 112 U. S., 414, 418.
U. S. vs. Ry. Co., 37 Fed. Rep., 555.

Such decisions should not be lightly disregarded, because public and private action is necessarily founded upon them. They become the basis of title. On the rulings of Secretaries Lamar and Noble, the Omaha grant has been adjusted, and defendant in error has made his home.

Many cases are cited wherein subsequent grants have been held to include indemnity lands under prior acts. They are all of them cases where there was either *no withdrawal or no exception.*

Grinell vs. Ry. Co., 103 U. S., 739.
Cedar Rapids Co. vs. Herring, 110 U. S., 27.
Ry. Co. vs. Ry. Co., 112 U. S., 414.
Ry. Co. vs. Ry. Co., 112 U. S., 731.
Barney vs. Ry. Co., 117 U. S., 228.
U. S. vs. Ry. Co., 39 Fed. Rep., 132.

The only force of these decisions, here, is to indirectly sustain our contention; for, it is because indemnity lands may be thus lost, that these specific withdrawals and exceptions are made to *concur*. They must *concur* to preserve the indemnity right in aid of the improvement. These cases declare that the claim for indemnity until selection is a mere unascertained float. What of it? The question is, not how great the right is, but whether specific land has been reserved for its exercise and excepted from subsequent grants. It is curious reasoning to say that indemnity lands are not excepted from a grant, because they might have been granted; for, unless grantable, there is no reason for their exception.

It is contended that if the exception of section six embraced indemnity lands at all, it only included such as were ultimately required for the purpose of indemnity. It is manifest that the words of the exception will not bear such construction. If the reservation at the time of grant had been of land withdrawn for military purposes, but not yet required or used, the grant, by the same construction, would attach to all not subsequently needed for that purpose. So with any other reservation. As fast as it is restored to the public domain, as not required for the purposes of the reservation, it falls, under plaintiff's construction, into the grant. The words of the exception, "*any* and *all* lands *reserved* * * * for *any* purpose," cannot be forced to mean "*such* reserved lands as may be needed for the purpose for which they were reserved." The statute makes the *fact of reservation*, when the grant takes effect, the condition of exception. This construction would make the fact of future need or use, for the purpose of the reservation,

the condition. To place such a meaning on the words of this exception, under the guise of construction, would be to repeal it and re-enact another in its stead, repugnant to it. We say repugnant: for, the exception of "such *part* of lands reserved as are needed," etc., is the very contradictory of the exception of "*any* and *all* lands reserved." To substitute one for the other is not construction, but legislation. In *Enckling vs. Simmons*, 28 Wis., 272, Dixon, C. J., said: "The proposition, however it may once have been held or considered, that the courts, upon what is termed an equitable construction or otherwise, may, against the plain language of a statute, and in opposition to the intent clearly expressed in the words, mitigate the violence of the letter by introducing exceptions where the statute itself contains none, so as to relieve in cases of hardship or particular inconvenience, has been too long and too frequently rejected to be now the subject of serious argument or doubt. Such doctrine, if it ever existed, was long since exploded, and the rule now universally recognized and acted upon is, that whatever else may be done with the words of a statute, they may never, in the language of Lord Bacon, 'be taken to a repugnant intent.'"

Commissioners vs. Rollins, 130 U. S., 662.
Demorest vs. Wynkoop, 3 John Ch., 142.
Brandling vs. Barrington, 6 Barn. & Cresw., 475.
French vs. Spencer, 21 How., 228.
Thurtide vs. U. S., 22 How., 290.

The same conclusion is compelled by another rule of construction, viz., that when a statute operates as a grant of public land, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government. It applies to legislative grants to states in aid of railroads, as well as to individuals. If the terms of such grants "are plain and unambiguous, there can be no difficulty in interpreting the act, but if they admit of different meanings—the one of extension, and the other of limitation—they must be accepted in a sense most favorable to the grantor. *And if a right is asserted against the government, it must be so clearly defined that there can be no question of the purpose of Congress to confer it.* In other words, *what is not given expressly, or by necessary implication, is withheld.* * * * * Applying these rules to this controversy, there does not seem to be any difficulty in deciding it. Whatever is included in the exception is excluded from the grant, and it therefore becomes important to ascertain what was excepted in order to determine what was granted."

Ry. Co. vs. United States, 92 U. S., 733.
Ry. Co. vs. Litchfield, 23 How., 66.
Rice vs. R. R. Co., 1 Black, 380.
Ry. Co. vs. Mo. Riv. Packet Co., 125 U. S., 260.
Fertilizing Co. vs. Hyde Park, 97 U. S., 660.
Lake Co. vs. Rollins, 130 U. S., 662.
Slidell vs. Grand Jean, 111 U. S., 412.

As the land in question was not taken or required for indemnity, it remained public land, unless it was granted to the plaintiff by the Act of 1864. That grant must be construed *not* to have granted it, unless its terms inevitably include it. "All grants of this description," the court said in *Ry. Co. vs. Litchfield*, 23 How., 66, "are *strictly* construed against the grantee; nothing passes but what is conveyed in clear and explicit language. As the rights here claimed are derived entirely from the Act of Congress, the donation stands upon the same footing of a grant by the public to a private Company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied." To hold this land within the grant of section three of the Act of 1864, is to imply terms not expressed in favor of *the grantee;* nay, it is to take, against the government and in favor of the grantee, the words of the exception "to a repugnant intent."

The case of *U. S. vs. McLaughlin*, 127 U. S., 428, is impertinent to this point. There was no express reservation and no specific exception in that case. It had been held that private land claims *sub judice* are impliedly reserved from public grants. *Newall vs. Sauger*, 92 U. S., 761. The question arose whether in case of a floating claim for a given quantity, within a much larger quantity having specific boundaries, the larger or only the smaller quantity was impliedly reserved under this doctrine. The court held the smaller quantity; for otherwise a general float, such as a land warrant, would reserve the whole public domain. Subsequent grants, therefore, operated on the larger quantity if enough was left to satisfy the float. Had there been a specific valid reservation in that case of the larger quantity to satisfy the float, and an express exception in the subsequent grant of *all* land reserved for *any* purpose, it could not have carried any part of the reservation. The court, plainly, did not consider that it touched this question, for no reference is made to the Wolcott case, or the many decisions resting upon it. That case and those decisions are conclusive that an exception like this cannot be restricted to lands ultimately required for the purpose of the reservation. It was ruled that, under this very exception, the mere fact of withdrawal excluded *all*

land within it from the subsequent grant, although none of it was required or could be taken for the purpose of the prior grant, because that grant did not embrace it.

The substance of the whole matter is that the exception of *all* lands reserved for *any* purpose, at the time the route is definitely fixed, goes to the description of the grant and makes the *fact of reservation*, at that time, the sole test of what is thus excluded from it.

Ry. Co. vs. Dunnemeyer, 113 U. S., 629.
Hastings vs. Ry. Co., 10 Sup. Ct. Rep.
McIntyre vs. Roeschlaub, 37 Fed. Rep., 556.
Ry. Co. vs. U. S., 92 U. S., 733.
Ry. Co. vs. Johnson, 7 Dec. D. I., 357.
Fort Sanders, 7 Dec. D. I., 430.

Mr. Justice Miller, in the Dunnemeyer case, said: "This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, *reserved* or otherwise disposed of by the United States, and to which a homestead or pre-emption claim had attached; for by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or *reserved*, or a homestead or pre-emption claim had attached to any of them. *In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections* NOT *in this condition are granted. The grant is limited, by its clear meaning, to the other odd sections, and not to these.* No attempt has ever been made to include lands reserved to the United States, which reservation afterward ceased to exist, within the grant, though this road and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations and were of great value. Nor is it understood that, in any case where lands had otherwise been disposed of, their reversion to the government brought them within the grant."

III.

The order of withdrawal was not revoked by the Act of 1864.

The argument for such revocation runs thus: If the Act of 1864 repealed that of 1856, it revoked the executive withdrawal: The Act of 1864 did repeal that of 1856: Therefore, the withdrawal was revoked by the repeal. The vice of the

argument lies in the error of each of its premises. The repeal would not revoke the withdrawal; and there was no repeal.

First. If the Act of 1864 repealed that of 1856, it did not thereby terminate the executive withdrawal.

The withdrawal, we have seen, was the act of the President, by the department. In *Bullard vs. Ry. Co.*, 122 U. S., 167, the court said of the revocation of such a withdrawal: "This [joint resolution] is not the way in which a reservation from sale or pre-emption is removed. In almost every case in which such a reservation is terminated, there has been a proclamation by the President that the lands are open for entry and sale." Thus this reservation was terminated. In 1887 the Secretary of the Interior by formal proceeding with the express approval of the President, revoked this withdrawal (6 Dec. D. I., 78 to 93). This is the regular practice.

In re Atlantic vs. Ry. Co., 2 Dec. D. I., 561.
Ry. Co. vs. Boardman, 7 Dec. D. I., 56.

Doubtless, Congress may revoke such an order, for its power over the public domain is paramount; but, as such revocation is universally made by the executive department, and may be best made by it, revocation by Congress should rarely, if ever, be *implied*. The Act of 1864 contains no express revocation; and, as Congress must be presumed to have known of the reservation, its intent to revoke, if it had any, would necessarily have been expressed. Instead of that, it recognized the reservation by an exception which inevitably embraces it. Said Secretary Noble: "Congress, when it made the grant of 1864, was presumably perfectly familiar with all of the proceedings prior to that date, under the Act of 1856, and must have known of said reservation for indemnity purposes under that Act. The words used in the sixth section of the Act of 1864 point most directly to the grant of 1856, and the existing reservation thereunder. Certainly more expressive or comprehensive words could not have been used if Congress had been legislating with special reference to such special grant and reservation" (10 Dec. D. I.) Congress, in enacting the Act of 1864 must also have foreseen that the converging grants of these roads, as they approached their northern termini, must encounter. The plaintiff thence infers that the grant of section three must have intended to disturb or defeat the indemnity right under the Act of 1856. Without the exception, that might be the inference; but *with* the exception, the inference is just the opposite. Knowing of this interference of the grants and of the reservation, Congress must have intended, by the exception, which necessarily embraced the withdrawal, that the grant of the third section should not operate on reserved lands within the interference.

An executive withdrawal does not fail because the statute which called it forth no longer exists. The executive department may think the reservation proper under other legislation, or for other reasons. In the Wolcott case the withdrawal was held to continue, after it was settled that the Act, in aid of which it was made, had no application to the lands withdrawn. *Bullard vs. Ry. Co.*, 122 U. S., 107. In 1878 the Attorney General held that a withdrawal, along a route which the Company had no power to adopt, remained in force until revoked. 6 Opp. Atty. Genl., 80. *Hamblin vs. Land Co.*, 147 U. S., 531. If it thus remains, after final determination, that the law under which it was made never applied to the land reserved, it may continue after such law, by repeal, has ceased to apply to it; especially when the repealing law regrants and increases the rights which the withdrawal was made to protect, and in terms excludes the land withdrawn from the new grant.

But, it is said, the exception of section six of the Act of 1864 is from the operation of the whole Act, and must exclude reserved lands from the grant of section one as well as from that of section three; and, as the whole additional place grant of section one is within this withdrawal, if the withdrawal is a reservation within section six, the exception would defeat the additional place grant altogether; and as this could not have been intended, the Act of 1864 must be held to have abrogated the withdrawal, because inconsistent or in conflict with it. The reasoning is unsound. The exception, like all laws, must be construed in view of its origin and object. It was devised, as we have seen, to exclude land reserved for one public improvement from subsequent grants for others. Sections one and three are independent grants for different improvements. It is the same as if the grants had been in separate acts and the exception repeated in each.

Wis. Cent. Ry. Co., 10 Dec. Dep. Int., 63.

Second. The Act of 1864 in no respect repealed the Act of 1856.

The right to earn the six miles place lands granted by the Act of 1856 had, as to the Omaha road and its predecessors in interest, vested by the location of its route before, and therefore could not be repealed or affected by the Act of 1864.

Schullenberg vs. Harriman, 21 Wall., 44.
Grinell vs. Ry. Co., 103 U. S., 739.
Walden vs. Knevals, 114 U. S., 373.
Van Wyck vs. Knevals, 106 U. S., 360.
Barney vs. Ry. Co., 117 U. S., 228.

The only right, under the Act of 1856, which the Act of 1864 could abrogate was that of indemnity. It is needless to cite authority for the power of Congress to repeal the pre-existing indemnity right. There is no vested right to indemnity lands until selection. The question, however, is not one of power, but of its exercise; not what Congress *may* but what it *did* do. The rule of construction is this: "When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that is practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy. But the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one and omit others, or add new provisions. In such cases the later act will operate as a repeal only when it plainly appears that it was a substitute for the first act. As Mr. Justice Story says, it 'may be merely affirmative, or cumulative or auxiliary.'"

Ry. Co. vs. U. S., 127 U. S., 406.
Sedgwick Stat. Law, 102, Note and Cases.

Apply this rule to the Acts of 1856 and 1864. They both relate to the same subject. Section one, of the Act of 1864, expressly declares that its grant is for the "same purpose" as that of the Act of 1856. That section also, unlike sections two or three, permits the indemnity selections to be made by the company; because, doubtless, it was understood that the same company which had already located its line and acquired a vested right to its place lands, was to take the additional grant on the same route. The grant, then, by the first Act, within six miles place limits, is repeated and increased by the last Act, and so, as to the six miles, dates from the first. The grant, within four miles additional place limits, dates from the last Act. The grant of the right of indemnity, within the five miles of indemnity limits common to both Acts, dates from the first Act, while that within the five miles additional indemnity limits fixed by the last Act dates from it. In all of this there is nothing repugnant. The last Act repeats and increases the rights and privileges granted by the first, and is thus affirmative, cumulative and auxiliary. The result is otherwise stated by the Assistant Attorney General, *In Re Wis. R. R. Farm Mortgage Company*, 5 Dec. D. I., 84, thus: "It is obvious that this Act (1864) was intended to be and was amendatory and supplementary to that of 1856. In no respect does it seek to *repeal* or restrict the Act of 1856." And in *Schullenberg vs. Harriman*, 21 Wall., 44, section one of the Act of 1864 is said to have granted "additional land" for the construction of

the same road, north of St. Croix River and Lake, for which the grant of 1856 was made; and both grants are said to be subsisting in favor of the company. Again, in *Farmers' Loan, etc., Co. vs. Ry. Co.*, 39 Fed. Rep., 143, Mr. Justice Harlan speaks of section one of the Act of 1864 as having "enlarged" the grant of the Act of 1856, and of the Omaha road as claiming under both Acts.

IV.

The plaintiff in error is estopped from asserting title to the land in controversy.

The plaintiff in error admitted on the trial the facts stated in the second and third defenses of the answer (p. 82, print. rec.) The facts stated in the third defense are, in substance, as follows: That after the decision of the Secretary of the Interior, on January 10, 1890, to the effect that the title of the demanded land never passed from the United States, the plaintiff in error acquiesced therein until the commencement of this action on April 9, 1890; that, on the ground of such decision, the land was thereupon opened for sale and entry, and defendant in error, being qualified, on January 12, 1890, entered it and paid all charges and fees, relying on such decision; that thereafter, before this action, he built his residence and made improvements on the land costing more than $200, with the same reliance; and that while he was in possession thus improving and building the plaintiff in error knew thereof, but remained silent during the whole time without making any claim or objection (pp. 6, 7, print. rec.) These facts estop the plaintiff in error from claiming the land.

Kirk vs. Hamilton, 102 U. S., 68.

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